82-1165

NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JAMES H. CORDER and HARRY W. WESTERN, on Behalf of Themselves and all Others Similarly Situated,
Petitioners,

vs.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County; et al., etc.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the opinion and judgment of the court of appeals finding constitutional a local act providing at-large elections for the Pickens County, Alabama, county commission, should be summarily vacated and remanded because the court of appeals never addressed or decided petitioners' properly pleaded claim, that the at-large scheme was in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973?

2. Whether a school board election feature requested by a school board based upon a statute to which the Attorney General has interposed an objection under §5 of the Voting Rights Act, was improperly incorporated into the district court order under McDaniel v. Sanchez, 452 U.S. 130 (1981)?

3. Whether the district court and court of appeals erred under prior decisions of this Court in implementing and approving a plan of apportionment for a school board including features that are contrary to state law and on a justification totally without evidentiary support?

PARTIES BELOW

The following were parties below:

Plaintiffs-appellants:

James H. Corder and Harry W. Western, on behalf of themselves and all others similarly situated;

Defendants-appellees:

Robert H. Kirksey, Individually and as Probate Judge of Pickens County; H. Hope Wheat, Individually and as Circuit Clerk and Register of Pickens County; Louie C. Coleman, Individually and as Sheriff of Pickens County, Aubrey Turnipseed, Travis Fair, Groce Pratt and Richard Walters, Individually and as the County Commissioners of Pickens County; Billie F. McCool, T.B. Woodard, Jr., J.L. Stone, Marvin Elmore, and J.V. Park, Individually and as members of the Pickens County Board of Education.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 639 F.2d 1191, and appended hereto at 1a.

The denial of the petition for rehearing and suggestion for rehearing en banc is reported at 688 F.2d 991, and appended hereto at 25a.

Two previous opinions of the court of appeals remanding the case are reported at 625 F.2d 520 and 585 F.2d 708, and are appended hereto at 100a and 53a respectively.

There are seven opinions or orders of the United States District Court for the Northern District of Alabama, all of which are unreported. They are appended hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit* sought to be reviewed was entered on March 16, 1981. A timely petition for rehearing and suggestion for rehearing en banc were denied on October 12, 1982.

This Court has jurisdiction to review the opinion below pursuant to 28 U.S.C. §1254(1).

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*Former Fifth Circuit Case. Section 9(1) of Public Law 96-452.

STATUTES INVOLVED

The issues presented by this petition involve Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the statute creating the at-large general election feature for the Pickens County, Alabama county commission, Act No. 141, Acts of Alabama, 1967 Regular Session, p. 476. They are appended hereto at 109a and 111a respectively.

Statutes involving the Pickens County, Alabama school board are Act No. 141, Acts of Alabama, 1949 Regular Session, p. 167, 116a, Act No. 41, Acts of Alabama, 1966 Special Session, p. 64, 121a, Act No. 72, Acts of Alabama, 1975 Fourth Special Session, p. 2694, 124a, and §16-8-4, Code of Alabama (1975), 130a.

STATEMENT OF THE CASE

The Reverends James H. Corder and Henry W. Western are black citizens and voters of Pickens County, Alabama. They filed suit in 1973 on behalf of all black citizens of Pickens County challenging the apportionment and method of election of the county commission and county school board. Their challenge was based on 42 U.S.C. §1973, 1973c, 1983, 1985(3), and the first, thirteenth, fourteenth, and fifteenth amendments, R1. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

A. The County Commission[1]

The county commission consisted of five members, four nominated from

1. For clarity, the commission and school board will be discussed separately, though for the most part both bodies were dealt with in the same opinions.

single-member districts,[2] but elected at-large in the general elections, with the fifth member, its chairman, being the county probate judge, nominated and elected at-large. The districting and method of election were set out in Act 141, Acts of Alabama, 1967 Regular Session, 111a, which repealed and reenacted a 1935 statute.

Plaintiffs challenged the apportionment of the four nomination districts and the at-large feature of the general election for these four districts. R5.

After discovery, plaintiffs moved for partial summary judgment. On January 23, 1975, the district court issued an order, 28a, holding unconstitutional the

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2. In contrast to a more common form of requiring only district residence, the act provided for single-member primary vote in each of the four districts.

plans for the county commission, and retained jurisdiction

> until constitutionally acceptable apportionment plans for the County Commission and Board of Education are enacted into law and approved by the Court... 35a.

In 1975, the Alabama Legislature enacted a local act for the County Commission, Act 594, Acts of Alabama 1975 Regular Session. This act reapportioned the four single-member commission districts for primary nomination but did not alter the at-large feature of the general election.[3] Plaintiffs did not challenge the apportionment, but moved to enjoin the continued at-large general election plan of the 1967 statute, and the commission, in turn, sought court approval to implement its new statute.

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3. This act was submitted to the Attorney General under 42 U.S.C. §1973c, and the Attorney General did not interpose an objection.

On March 12, 1976, the district court entered an order concluding that the county commission statute was constitutional and ordered it into effect for the upcoming May primaries. 36a. The order included no findings of fact, and did not mention the statutory claim, Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

A final order and judgment was latter issued, 45a, and amended, 49a, and plaintiffs appealed.

After oral argument, the court of appeals, on November 16, 1978, remanded the case because it felt the district court had "erred by omitting to make adequate findings of fact as to the constitutionality of the commission plan;..." 59a. Jurisdiction was retained, the findings to be made within sixty days.

The district court entered its supplemental opinion on February 16, 1979, 84a. It addressed only the standards of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), and concluded that plaintiffs failed to prove "that the election scheme dilutes the voting strength of blacks or that the scheme was designed to discriminate against blacks." 89a.

The appellate record was supplemented, and on August 21, 1980, the court of appeals again remanded, this time for thirty days,

> to enable the district court to reexamine the evidence, and its findings, in the light of City of Mobile, Ala. v. Bolden, [446 U.S. 55 (1980)], and to entertain any application plaintiffs may care to make to present further evidence on their claim that the at-large method of electing the county commission is unconstitutional, 625 F.2d 520, 521, 102a.

Addressing only the constitutional issue of intent, the district court again concluded, "There is no evidence that the

election scheme was designed to discriminate against blacks." 108a.

On March 16, 1981, the court of appeals issued its opinion, 639 F.2d 1191, 1a. Addressing the county commission, the court of appeals held:

> [T]he district court has found on remand that there are simply no facts in the record probative of racially discriminatory intent on the part of those officially responsible for the Pickens County Board of Commissioners at-large election scheme. Record, vol. 1 at 227. Having reviewed the record, it is apparent that those findings are not clearly erroneous. Therefore, the district court's approval of the legislatively enacted at-large scheme for the election of Pickens County's Commissioners passes constitutional muster, and plaintiffs' first contention must fail. 639 F.2d at 1195, 13a-14a.

The court of appeals did not mention plaintiffs' statutory claim, 42 U.S.C. §1973, or review any findings regarding discriminatory effects.

The plaintiffs filed a timely petition for rehearing and suggestion for

rehearing en banc on April 14, 1981, and later, with the court's permission filed a supplemental memorandum addressing Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982), and the amendment to Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

On October 12, 1982, the court of appeals issued its final opinion 688 F.2d 991, 25a. It recited it had withheld its mandate and action on the petition for rehearing pending the Lodge decision. It concluded that Lodge did not affect its disposition of this case. There was no mention of Section 2.

B. The School Board

The statute governing school board elections was Act 41, Acts of Alabama, 1966 Special Session. This act changed the method of election from a 1949 statute which had five single-member districts, to requiring five at-large

seats. There were four residential districts (to be identical with the county commission districts); a fifth at-large position, with no residency requirement, was to be president or chairman of the board.

Plaintiffs challenged the 1949 districts as being malapportioned, and the 1966 Act as both unconstitutional and illegally implemented without preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. R7. Their prayer for relief requested the convening of a three-judge court and an injunction requiring compliance with Section 5.

After discovery, plaintiffs moved for partial summary judgment. On January 23, 1975, the district court issued an order, 28a, holding unconstitutional the plan for the school board and retained jurisdiction

> until constitutionally acceptable apportionment plans for the County

> Commission and Board of Education are enacted into law and approved by the Court... 35a.

In 1975, the Alabama Legislature enacted a local act for the school board, Act 72, Acts of Alabama, 1975 Fourth Special Session. That law provided five at-large seats with no residential districts, the chairman to be selected by the board members annually from its membership. 124a. This act was submitted to the Attorney General under 42 U.S.C. §1973c, and the Attorney General interposed an objection.

Plaintiffs moved for injunctive relief against the school board, and the school board, in turn, sought court approval to implement its new statute. On March 17, 1976, the court entered an order that refused permission for the school board to implement its new all

at-large statute, apparently because of the Attorney General's objection. 40a, 41a. Because of the primary scheduled for May 4, 1976, the Court felt it should fashion a reapportionment plan. Id.

While acknowledging the preference for single-member districts in court ordered plans, the court recited three "unusual circumstances which justifiy adoption of a modified single-member district plan," 42a:

> First, the short period of time remaining before the primary election is not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. Secondly, although the four Commissioners' Districts of Pickens County are constitutionally apportioned, the Court declines to order the reduction of the Board of Education to four members. Thirdly, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones,...
> Id.

Consequently, the court implemented a plan that required four school board

members be nominated and elected from single-members districts, the districts to be the same as the four county commission districts, with a fifth member elected at-large. 43a.

A final order and judgment was later issued, 45a, and amended, 49a, and plaintiffs appealed.

After oral argument, the court of appeals, on November 16, 1978, remanded the case for additional findings on the school board at-large seat, being "unable to discern whether sufficient justification exists for the employment of the at-large seat." 80a. Jurisdiction was retained, the findings to be made within sixty days.

The district court entered its supplemental opinion on February 16, 1979, reiterating the shortness of time and lack of desire to reduce the board

size, and the school board's "indicated ... preference", 98a, for having one board member primarily responsible for each of the four school attendance zones.

> The election scheme of Board members has followed the high school attendance zones since at least 1949. A fifth single-member district would create a situation where one of the five districts has either no schools in it or parts of two or more such attendance zones. The imbalance of such a scheme is inherent. 99a.

The appellate record was supplemented, and after the remand (discussed above which affected only the county commission), on March 16, 1981, the court of appeals issued its opinion, 639 F.2d 1191, 1a. Addressing the at-large school board member feature, the court of appeals put aside the impending election justification.

> While this might surely justify imposition of an interim remedy, ... we refuse to hold it is sufficiently weighty to justify a permanently established, court-fashioned at-large election plan.
> 639 F.2d at 1195, 17a.
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> ...
>
> The matter of the fifth member, while problematic, seems most appropriately resolved as the district court has done. Given Alabama's expressed policy, and the structural desirability of a five-member board, it is proper that a five member board be maintained. The appropriateness of this goal, when coupled with the unique circumstances justifying maintenance of Pickens County's four-zone school system, and its overlapping constitutionally apportioned four election districts, leads to an acceptance of an at-large scheme. Since reapportionment into five districts is impractical, and because a five member board is structurally preferable, a county-wide election of the fifth member seems the most appropriate result.
> 639 F.2d at 1196, 20a-21a.

As discussed above, p. 10, rehearing was denied. The court of appeals did not mention the issues, relevant to the school board, raised by the rehearing petition.

REASONS FOR GRANTING THE WRIT

This petition presents two entirely separate issues--a question concerning the merits of plaintiffs' cause of action alleging vote dilution regarding the Pickens County, Alabama, board of commissioners, and a question concerning the remedy of plaintiffs' successful claim against the Pickens County, Alabama, school board. They will be discussed separately.

I.

The Affirmance of the Dismissal of Plaintiffs' Challenge of Vote Dilution, with no Review of the Record of Discriminatory Effects, and Without Considering Section 2 of the Voting Rights Act, 42 U.S.C. §1973, Should be Summarily Vacated and Remanded.

Plaintiffs' complaint specifically pleaded a violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, along

with constitutional claims of vote dilution, in the at-large general election feature of the Pickens County board of commissioners.

Although as long ago as 1973 the court of appeals below decided that Section 2 required only proof of racially discriminatory effect, Toney v. White, 488 F.2d 310 (5th Cir. 1973) (en banc), (affirming a decision for plaintiffs although the district court specifically found a lack of proof of racially discriminatory purpose), that court has consistently decided voting cases on constitutional grounds without applying Section 2. E.g., Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1975); Nevett v. Sides, 571 F.2d 209, 213, n.3 (5th Cir. 1978),

cert. den. 446 U.S. 951 (1980) (Section 2 issue held not presented for failure to plead it in complaint); Bolden v. City of Mobile, 571 F.2d 238, 242 n.3 (5th Cir. 1978); Broussard v. Perez, 686 F.2d 320 (5th Cir. 1982) (affirming findings of intentional discrimination for a fourteenth amendment violation); McMillan v. Escambia County, 688 F.2d 960, 961-62, n. 2 (5th Cir. 1982) (affirming a finding of constitutional violation; while acknowledging Section 2 requires no proof of purposeful discrimination, resolution of the Section 2 claim deferred).

Perhaps because White v. Regester, 412 U.S. 755 (1973), was decided on constitutional grounds, and because courts and litigants alike have viewed the scope and meaning of Section 2 as unsettled, the court of appeals below has never squarely resolved the issue of

the applicaton of Section 2 in a vote dilution claim. See Bolden v. City of Mobile, supra.

Although federal courts should avoid decisions on constitutional grounds if an adequate statutory ground is available Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), "[t]he doctrine is not ironclad," Hagans v. Lavine, 415 U.S. 528, 546 (1974), see, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 271 (1977); Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982). But while the court of appeals may have properly reached the constitutional claim, it erred in refusing to address the plaintiffs' statutory claim, properly pleaded and presented to the court.[4]

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4. This not the only time the court below has ruled against plaintiffs in a dilution case without deciding the Section

FOOTNOTE CONTINUED ON FOLLOWING PAGE

This Court should grant the petition for writ of certiorari, and summarily vacate and remand the case for the consideration of plaintiffs' claim under the recently amended Section 2 of the Voting Rights Act, 42 U.S.C. §1973.[5]

FOOTNOTE CONTINUED... 2 effects issue. See, Cross v. Baxter, 639 F.2d 1385 (5th Cir. 1981), 688 F.2d 279 (5th Cir.), reh. den. 693 F.2d 135 (5th Cir., 1982).

5. Section 2, while it incorporates certain features of the analysis in White v. Regester, 412 U.S. 755 (1973), unquestionably contains a different standard from that under the constitution. Not only is intent not a requirement for a statutory violation, but (1) consideration of unresponsiveness is generally to be avoided under Section 2, S. Rep. No. 97-417, 97th Cong., 1st Sess. 29, n.4, 30 (1982); H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 30 (1982); (2) proof of forseeability of consequences is quite relevant evidence of a statutory violation, S. Rep. No. 97-417, supra, at 27, n. 108; and (3) Section 2 clearly protects more than merely the right to register and cast a ballot, but any act necessary to make a vote count equally with that of the vote of other citizens, S. Rep. No. 97-417, supra, at 30, n. 120; H. Rep. 97-227, supra, at 30.

II.

A

Under Prior Decisions of this Court, the District Court Erred in Ordering a Reapportionment Plan for the School Board that Included an At-Large Position.

Under the 1949 act governing school board elections, five members were elected from single-member districts. In 1966 the act governing the school board was amended to require at-large elections with four members to be residents of the county commission districts, as they were from time to time defined, and a fifth member to be elected without regard to residency. This act should have been, but never was, submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

After the district court declared the 1949 and 1966 acts unconstitutional, the

legislature adopted a 1975 act requiring five members to be elected at-large without regard to residency. This Act further stated:

> [T]he Board may, if it determines educationally advantageous, designate one of its members as having prime responsibility for each of the Board's four school attendance zones. However, nothing in this act shall be construed so as to require the Board to make such designations. 125a, 126a.

The Attorney General objected to the act under Section 5.

The district court ordered, and the court of appeals affirmed, a plan with four single-member districts and one at-large.[6] The court adopted the

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6. The at-large seat silently became the chairman position. The district court order merely designated an at-large seat; there was no discussion of the chairman. 43a, 44a. The court of appeals in its first opinion referred to this fifth person as "the chairman." 70a. On remand, the district court apparently assumed the at-large member was to be the chairman, 98a, and while

FOOTNOTE CONTINUED ON FOLLOWING PAGE

4-1 plan because the school board had expressed a preference for having one member primarily responsible for each of four school attendance zones. 42a.

FOOTNOTE CONTINUED... never specifically addressed, the chairmanship concept was sub silentio affirmed by the court of appeals, 17a-21a.

State law requires that county school boards annually select one of their members as president. Section 16-8-4, Code of Alabama (1975), 130a. Thus the courts below failed to comply with Connor v. Finch, 431 U.S. 407, 414 (1977), and Upham v. Seamon, ___U.S.___, 102 S.Ct. 1518, 1522 (1982), which require that in fashioning an interim reapportionment plan the federal courts modify state political policy only in a manner "necessary to cure any constitutional or statutory defects." Id.

Implementation of an At-Large School Board Seat Conflicts With Prior Decisions of this Court Which Require a Preference for Single-Member Districts.

While both courts below acknowledged the preference for single-member districts in court ordered reapportionment plans, mandated by such cases as Chapman v. Meier 420 U.S. 1 (1975); Connor v. Finch, 431 U.S. 407 (1977), Mahan v. Howell, 410 U.S. 315 (1973), they nonetheless considered the at-large seat here justified. The court of appeals held that the facts as found by the district court "reveal circumstances special enough to allow the at-large scheme of election." 639 F.2d 1196, 19a.

This is far short of the "persuasive justifications," based on "important and significant state considerations

[which] rationally mandate" that a single-member plan "cannot be adopted." Chapman v. Meier, supra, at 26-27.

The plan here simply does not rest on any state policy, or even past practice. The school board's preference is found for the first time in the 1975 statute, the statute which abolished all districts, both election and residential. The only state policy perceivable is that the state, in legislating for Pickens County, prefers at-large seats to single member districts for the school board. The statute's authorization for the school board to assign one of its members to have primary responsibility for a school attendance area is an adaptation to attempt to retain one of the de facto features of district elections. But this statute, having been objected to by the Attorney General, is

not a permissible basis for implementing a redistricting plan with an at-large seat. Rather than a "persuasive justification," this is precisely what is prohibited by Connor v. Finch, supra, Chapman v. Meier, supra, and subsequently by Upham v. Seamon, ___ U.S. ___, 102 S.Ct. 1518 (1982).

The Four Member/Four School Zone Plan is Not Based on Any Historically Significant State Policy or Uniqueness.

Reapportionment plans must and should be based in practicality, and were it not for the single member preference required by this Court, the attempt to align school board members with school attendance zones might pass muster. Chapman v. Meier, 420 U.S. 1, 26 (1975), permits deviation from this preference if there is an "historically significant

state policy or unique features" present.

The district court supported the school board's preference by stating that "while the [school attendance] zones are not congruent with the Commissioners' districts, there is a substantial overlap," 98a, and stating that "[t]he election scheme of Board members has followed the high school attendance zones since at least 1949." 99a.

The court of appeals said:

> We agree with the district court that a five-member board of education makes good sense in Pickens County. We also agree that the facts as found by the district court reveal circumstances special enough to allow the at-large scheme of election. 19a.

Initially it should be noted that while Alabama law requires school boards to be composed of five members, 97a, there is nothing in the record to indicate that an Alabama county having four school

attendance zones is unusual, much less special or unique.

Additionally, there is simply nothing in the record - no maps, no descriptions, no stipulations - that reveals the shape of school attendance zones, past or present, or the number of past zones. As best can be gleaned these statements by the district court are not accurate.

1. The 1966 act (under which members were being elected when this suit was filed) did not define districts in terms of school attendance zones, but made them identical to the county commissioners' districts, as then or in the future defined.

2. According to the school board, there were six high schools in 1969, three years after the board went from five districts to four. Brief of Appel-

lees Pickens County Board of Education, p. 11a (5th Cir. No. 76-3602).

3. According to official sources, there were nine high schools in 1949, the year the five single-member district statute was enacted.[7] It does not appear likely that the five districts followed the nine racially separate school zones. Further, when a black high school was added in 1952 there was no alteration in the school board election plan, but when the six white high schools were reduced in number to four, the five districts were reduced to four.

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7. Source: Alabama State Board of Education Educational Directory, yearly editions 1940-41 to 1972-73. In 1949 there were six white and three black high schools. In 1952, a fourth black high school was added, with no alterations in election districts. Between 1964 and 1967, two white high schools were closed, leaving four, at which time the election scheme was changed to have four residential districts. The four black and four white schools were merged or closed between 1969 and 1972, leaving four schools.

Whatever credence this idea had as a state policy or historical precedent, the district court could not have evaluated it to properly counterbalance the single-member district preference; and the historical record indicates any such policy was not divorced from the dual school system.

Under Chapman v. Meier, supra, the utilization of an at-large seat is not permissible.

B.

The Plan Below Effected a Policy Choice of the Local School Board and Should not have Been Implemented, or Should not Continue to be Utilized under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

Because the district court effectuated a policy preference of the local school board as reflected in the 1975 statute, to implement this plan in the face of the Attorney General's objection

violated Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, and conflicts with McDaniel v. Sanchez, 452 U.S. 130 (1981). In McDaniel this Court said:

> As we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people -- no matter what constraints have limited the choices available to them -- the preclearance requirement of the Voting Rights Act is applicable. 452 U.S. at 139.

Petitioners here are in a stronger position that the plaintiffs in McDaniel v. Sanchez, for there has already been an objection interposed. While it might have been acceptable to implement that at-large seat for the 1976 elections, see, Mahan v. Howell, 410 U.S. 315, 333 (1973), the 4-1 plan should have been modified before the elections two years later, indeed for all three general elections held since 1976.

This Court should issue the writ of certiorari and summarily vacate and remand the approval of the at-large seat for the school board.

CONCLUSION

For the foregoing reasons, this Court shcuild issue the writ of certiorari, vacate the opinion and judgment below, and remand to the court of appeals for further consideration.

Respectfully, Submitted,

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[639 F.2d 1191]

JAMES H. CORDER, and Harry W. WESTERN on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants;

v.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County et al.,

Defendants-Appellees.

No. 76-3601

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

March 16, 1981

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, HILL and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

This case is before us following the

district's court's compliance with our last remand order. Corder v. Kirksey, 625 F.2d 520 (5th Cir. 1980) (Corder II). We affirm the findings and conclusions of the district court.

Because an understanding of the procedural posture of this case is important for an adequate prespective on our opinion, we shall discuss briefly the history of this litigation. For a more complete exposition of the history of this case, reference should be had to our opinion in Corder v. Kirksey, 585 F.2d 708 (5th Cir. 1978) (Corder I).

I

In 1973 the black residents of Pickens County, Alabama brought this action to challenge the constitutionality of the procedures used to elect the Pickens County Commission, the Pickens County

Democratic Executive Committee[1], and the Pickens County Board of Education. This action was based upon allegations that the relevant election districts were impermissibly malapportioned, see generally Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and that the at-large components of the electoral schemes unconstitutionally diluted the votes of blacks. See White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

Before this action was commenced, the procedure for election of Picken's five county commissioners was as follows: each of four districts nominated Commission

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1. None of the issues presented below concerning the Democratic Executive Committee remain for resolution on this appeal. See Corder v. Kirksey, 585 F.2d 708 at 710, n.3 (5th Cir. 1978) (Corder I).

candidates. These nominees then stood for election at large, all voters in the county voting for a candidate for each vacant Commission seat. This resulted in the election of four commissioners, each representing one district. The County Probate Judge filled the fifth Commission seat. Before this suit, the five members of the Board of Education were elected in the following manner: each of four members of the Board were required to reside in one of four districts, thus assuring each district's representation on the Board. Each of these candidates, however, was nominated on a county-wide basis. The fifth Board member was not required to reside in a particular district, and was also nominated at-large. All five members were elected on a county-wide or at-large basis.

On the plaintiffs' motion, the district court invalidated the district apportionment scheme employed in both the Commission and Board of Education elections as violative of the "one man, one vote" mandate of Reynolds, supra. The court enjoined the election of Commissioners until the Alabama Legislature corrected the constitutional defects in the scheme. Alabama promptly redrew the Commission district lines, but did not alter the at-large feature of the Commission election plan. The plan was submitted to the court and approved. On this appeal, the plaintiffs do not contest the validity of the new district lines. Rather, they argue that the at-large feature of the election of county commissioners is constitutionally offensive.

In regard to the Board of Education, the district court found the time

constraints imposed by an impending election to mandate a court-fashioned, rather than state-legislated, remedy. Accordingly, the court provided that the Board of Education would be elected according to the following plan: the Board would remain a five-member board. Four members were to be nominated and elected from four single-member districts corresponding to the constitutionally reapportioned Commission election districts. The fifth member, and Chairman, of the Board was to be elected at large. The plaintiffs readily accepted the district approtionment scheme and, also, the provision that four single-member districts would each elect a single representative. The plaintiffs contested, however, the at-large election of the fifth Board member.

When initially faced with this appeal, we remanded the case to the district

court for further findings in regard to both the court's approval of the at-large feature of the Commission election plan and the court's decision to fashion a Board of Education electoral scheme that included an at-large component. We instructed the district court to make findings on the former issue in light of our decision in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), and on the later [sic] issue in light of the requirement that "it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance [as opposed to a multimember district or at-large scheme] cannot be adopted." Chapman v. Meier,

420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). See also Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977); Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320 (1973); Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971); Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977).

On remand, the district court made findings and concluded that neither the Commission nor the Board of Education at-large schemes were constitutionally offensive. Record, vol. 1 at 214. When the case was resubmitted to us, however, we found that an intervening Supreme Court decision, Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), had cast doubt on the vitality

of this circuit's approach, as articulated in Zimmer, supra, to the constitutional adequacy of legislatively enacted at-large schemes of election. Thus, we remanded the case again to the district court for further findings on the Commission election plan in light of the Supreme Court's mandate in Bolden. The district court has complied with our request, and has once again found the at-large plan constitutional. Record, vol. 1 at 225. The case is now in a posture that permits the resolution of plaintiffs' appeal.

II

A.

Plaintiffs first contend that the district court erred in approving the legislative decision to implement a scheme calling for the at-large election of county commissioners. The plaintiffs

argue that the at-large system of election dilutes the votes of blacks, and thus violates the fourteenth and fifteenth amendments of the Constitution.

It is clear that an at-large election is not a per se unconstitutional dilution of minority votes. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858, 1868, 29 L.Ed.2d 363 (1971). Prior to Bolden, the law of this circuit required "a showing of racially motivated discrimination" for successful prosecution of a claim of constitutionally impermissible vote dilution under the fourteenth or fifteenth amendments. Nevett v. Sides, 571 F.2d 209, 219, 220 (5th Cir. 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). See also Bolden, supra, 446 U.S. at 99, 100 S.Ct.

at 1517 (1980) (White, J., dissenting). That showing, however, could be made through recourse to inference; inference compelled by "such circumstantial and direct evidence of intent as may be available." Bolden v. Mobile, 571 F.2d 238, 246 (5th Cir. 1978) (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977)), reversed, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

A plurality of the Supreme Court has held that this circuit's previous standards for reaching an inferential determination of discriminatory intent are inadequate. Bolden, supra, 446 U.S. at 72, 100 S.Ct. at 1503 (per Stewart J.). Our failure, however, appears to have turned on the quantum of evidence required for such a finding, rather than

upon the substance of the approach itself:

> [T]he Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination, but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in Zimmer v. McKeithen .... That approach, however, is inconsistent with our decisions in Washington v. Davis ... and Arlington Heights.... Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose.

Id. (footnote omitted).

This statement, coupled with the plurality's apparent reaffirmation of White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), see id., 446 U.S. at 69, 100 S.Ct at 1051, indicates the plurality held that we must apply a more rigorous test when drawing the inference of racially discriminatory

purpose from facts, yet may, indeed must, continue to reach such a determination by recourse to facts inferentially referably to a discriminatory purpose, albeit facts perhaps almost conclusively referable to that offensive purpose. Moreover, after examining Justice White's dissent in Bolden, as well as Justice Blackmun's concurrence in the same case, we believe a clear majority of the Supreme Court would endorse the constitutional validity of recourse to a factually based inferential determination of the existence of racially discriminatory purpose. The problem, simply put, is: What is an adequate quantum of proof?

We admit to an initial perplexity in regard to this issue. Nevertheless, our review of the district court's findings allow us to put off to another day any attempt at a definitive interpretation of Bolden. In this case, the district

court has found on remand that there are simply no facts in the record probative of racially discriminatory intent on the part of those officially responsible for the Pickens County Board of Commissioners at-large election scheme. Record, vol. 1 at 227. Having reviewed the record, it is apparent that those findings are not clearly erroneous. Therefore, the district court's approval of the legislatively enacted at-large scheme for the election of Pickens County's Commissioners passes constitutional muster, and plaintiffs' first contention must fail.

B.

We may not so easily dispose of plaintiffs' second contention. Plaintiffs argue that it was constitutionally impermissible for the district court to have fashioned a remedy in regard to the

selection of the fifth member of the Board of Education which provided for at-large election. In Bolden, a clear majority of the Supreme Court has reaffirmed that "'[S]ingle-member districts [as opposed to at-large, or multi-member district schemes] are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320.' Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465." Bolden, 446 U.S. at 66 n.12, 100 S.Ct. at 1499 n.12 (1980). See also Bolden at 103-106, 100 S.Ct. at 1520-21 (1980) (Marshall, J., dissenting).

This circuit has followed that mandate: "When district courts are forced

to fashion reapportionment plans, the general rule is that single-member districts are to be preferred." Wallace v. House, 538 F.2d 1138, 1142 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977). In interpreting this standard, we have maintained that the unique or special circumstances allowing for a court-fashioned election scheme incorporating an at-large element were circumstances encompassing "the rare, the exceptional, not the usual and diurnal." Id. at 1144. It is against this standard that the district court's scheme must be judged.

The district court offers essentially two reasons for imposition of the at-large plan to elect the fifth Board of Education member. The first is that the short time it possessed to fashion a fair remedy in the face of an impending

election dictated the use of the at-large plan as a matter of constitutionally appropriate expediency. Record, vol. 1 at 219. While this might surely justify imposition of an interim remedy, see Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977), see also Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), we refuse to hold that it is sufficiently weighty to justify a permanently established, court-fashioned at-large election plan.

The second 'unique circumstance' is that Alabama has a longstanding policy favoring five-member boards of education. This policy makes good sense given the majority-vote decisionmaking procedure of these boards and the particular Pickens County plan of four school attendance zones and corresponding four

high schools, (both schemes established in a successful effort to comply with a desegregation order, see Record, vol. 1 at 220). Since these zones "substantially overlap" the Commission and Board of Education election districts, it is appropriate that while one Board of Education member should be elected from and represent each of these zones, the necessary fifth member, "responsive to all voters," should be elected on a county-wide basis. Record, vol. 1 at 219-220. As the court viewed the problem, it was faced with either eliminating a structurally necessary, as well as legislatively mandated, fifth Board member, thus providing for a completely single-member district scheme, or reapportioning the Board of Education election districts to allow for five districts, thus providing for a Board

member representing a district devoid of a high school and not predominately identified with a particular school attendance zone.

We agree with the district court that a five-member board of education makes good sense in Pickens County. We also agree that the facts as found by the district court reveal circumstances special enough to allow the at-large scheme of election.

Pickens County's four-attendance-zone system was the result of a terminal desegregation order. Thus, those zones are certainly not properly referable to purposeful discrimination. Moreover, although the finding of "substantial overlap" between the constitutionally apportioned election districts and the school attendance zones is a bit rough, it is in our judgment, not clearly

erroneous. See Record, vol. 1 at 146. These findings, coupled with an understanding that school board members traditionally represent a constituency composed of those who send their children to particular schools, makes the district court's plan for one member to be elected from and represent each of four districts, each roughly approximating a school attendance zone, quite proper.

The matter of the fifth member, while problematic, seems most appropriately resolved as the district court has done. Given Alabama's expressed policy, and the structural desirability of a five-member board, it is proper that a five-member board be maintained. The appropriateness of this goal, when coupled with the unique circumstances justifying maintenance of Pickens County's four-zone school system, and its overlapping

constitutionally apportioned four election districts, leads to an acceptance of an at-large scheme. Since reapportioment into five districts is impractical, and because a five-member board is structurally preferable, a county-wide election of the fifth member seem the most appropriate result.[2]

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2. We have applied what we feel to be the proper test for determining the constitutional adequacy of a court-fashioned at-large scheme. It is necessary, however, for us to offer this brief aside concerning a problem potentially connected with qualitative vote dilution claims such as that of these plaintiffs.

When one person's vote is given more weight than another's, the judicially cognizable constitutional violation is clear. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Simply put, the disproportionate distribution of the right to vote is mathematically demonstrable--it is objectively verifiable. A claim of qualitative vote dilution, on the other hand, is quite distinct. The claim there is that, despite each man having an equal vote, as well as having equal access to the voting process, the majoritarian form of election somehow fails to "serve the

FOOTNOTE CONTINUED ON FOLLOWING PAGE

FOOTNOTE CONTINUED---values of fair representation." Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977).

> "[T]he focus in such cases [qualitative vote dilution cases] has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities ..., a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." Whitcomb v. Chavis, 403 U.S. 124, 158-159, 91 S.Ct. 1858, 1877, 29 L.Ed.2d 363. Bolden, supra 446 U.S. at 65, 100 S.Ct. at 1499 (1980).

In the proceedings below, the plaintiffs highlighted this aspect of their claim with particular clarity:

> The essence of all "one person-one vote" cases is to make such a system as representative as possible ... John Stuart Mill expressed it best when he wrote, in Representative Government:
>
> > In a really equal democracy any and every section would be represented, not disproportionately, but proportionately.

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FOOTNOTE CONTINUED ---

> A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority.

Plaintiffs' Memorandum In Support Of Motion For Relief, Record, vol. 1 at 177.

The Supreme Court has voiced similar sentiments in discussing the preference for single-member district democracy in court-fashioned elections. It is said that, in the absence of a "singular combination of unique factors," single-member districts are preferred because multimember districting and thus at-large schemes, see Bolden at 69-71, 100 S.Ct. at 1501-02 (1980), contribute to making "legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities...." Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977).

This stance troubles us a great deal. First, it seems at odds with the Bolden plurality's decided emphasis on verifiable discriminatory intent as the basis for a finding of constitutionally impermissible vote dilution. Second, and much more troubling,

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For the foregoing reasons, we must reject plaintiffs' contentions and affirm the judgment of the district court.

AFFIRMED.

FOOTNOTE CONTINUED---is the implicitly political character of this position. Perhaps it is the judiciary's role to work justice for those discrete, insular minorities at a perceived disadvantage in our system of representative democracy, see United States v. Carolene Products Co., 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234 (1938), but we question whether that role is most effectively served by immersing the court in the resolution of questions which center upon the legitimacy of conflicting theories concerning the nature of a truly representative form of government.

[688 F.2d 991]

JAMES H. CORDER, and Harry W. Western on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

ROBERT H. KIRKSEY, individually and as Probate Judge of Pickens County, et al.,

Defendants-Appellees.

NO. 76-3601

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT*

October 12, 1982

Appeal from the United States District Court for the Northern District of Alabama, Frank H. McFadden, Judge.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC

---

*Former Fifth Circuit Case, Section 9(1) of Public Law 96-452, October 14, 1980.

(Opinion March 16, 1981, 5th Cir., 1981, 639 F.2d 1191.)

Before TJOFLAT, HILL AND FAY, Circuit Judges.

PER CURIAM:

We issued an opinion in this case on March 16, 1981. The mandate was then withheld pending the Supreme Court's consideration of Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982), as was action on petitions for rehearing and rehearing en banc. We have now concluded that the Supreme Court's decision in Rogers v. Lodge does not affect our analysis or disposition of this case. Therefore, the mandate in Corder v. Kirksey, 639 F.2d 1191 (5th Cir. 1981), shall issue forthwith.

The Petition for Rehearing is DENIED

and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA, WESTERN DIVISION

JAMES H. CORDER, et al.,

Plaintiffs;

v.

ROBERT H. KIRKSEY, et al,

Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed January 23, 1975]

ORDER

This cause came on to be heard on the motion of plaintiffs for partial summary judgment. The Court has examined the pleadings, briefs and other papers filed in the case and is of the opinion that the motion is due to be granted in part.

The case at bar is a challenge to the apportionment scheme of Pickens County for the County Commission, the

Board of Education and the County Democratic Executive Committee.

The County Commission consists of five members. Four members are elected to be commissioners, while the Pickens County Probate Judge acts as the ex-officio chairman. The election scheme calls for one member to be nominated by the voters of each of four districts. Successful candidates in the primary then run at-large for numbered places on the Commission. The flaw in this system arises in the nominating election, where candidates run only for the support of one district. The districts are not of equal size. The present population figures produce this approximate breakdown:

District	Population
1 (Reform)	6,249
2 (Aliceville)	5,967
3 (Gordo)	4,516
4 (Carrollton)	3,594

As can be readily seen from these figures, the districts are malapportioned, with District 1 and 2 suffering from under-representation and 3 and 4 enjoying substantial over-representation. In terms of the present election system, the voters of District 1 and 2 have much less voice in who is nominated for the final at-large election. It is obvious that the nominating primary is a crucial step in the election, and subject to the same protections.

The County Commission must be apportioned on the principle of "one man, one vote." Avery v. Midland County, 390 U.S. 474 (1967). It is apparent that it is

presently malapportioned, and so the Court must act. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). The Commissions' districts were defined by Act 156, 1923 Regular Session of the Alabama Legislature. The present election scheme was set up by the provisions of Act 278, 1935 Regular Session. Act 141, 1967 Regular Session, repealed and re-enacted the provisions of the earlier statutes applicable to the Commission. Act 141 only has local force and effect, and so a single judge can act on a challenge to its constitutionality. Moody v. Flowers, 387 U.S. 96 (1967); Wright, Federal Courts, §50 (1970). Under the authority of Avery, those provisions of Act 141 that draw the district lines are unconstitutional in that they contravene the doctrine of "one man, one vote" by malapportioning

the Pickens County Commission.

The election of Board of Education is governed presently by Act 41, 1966 Special Session. It is claimed that this Act is invalid for failure to obtain approval under the 1965 Voting Rights Act (42 U.S.C. 1973c). The prior procedure for election of Board of Education members was governed by Act 141, 1949 Regular Session. Whichever system is used there is malapportionment among the districts and the election of school board members under either Act is unconstitutional.

The County Democratic Executive Committee is grossly malapportioned. One member of the Committee is elected from each precinct voting box in the County, and a substantial variation exists between the number of voters assigned to each box. For example, beat #17 has one box, and a population of

approximately 62, and elects one Committee member, while beat #19 has a population of around 4,992, seven boxes, and elects seven members. The result is that beat #17's 62 people get one member, while in beat #19 there is one member for every 713 residents. Other disparities exist.

In light of the foregoing, it is ORDERED, ADJUDGED and DECREED that the County Commission is due to be reapportioned or the voting method changed. It is further ORDERED that any elections for the County Commission under the present system be, and hereby are, enjoined.

It is further ORDERED that Act No. 141 of the 1967 Regular Session of the Alabama Legislature, insofar as this statute establishes the apportionment of commissioners' district in Pickens County, is unconstitutional and void.

It is further ORDERED that the County

Board of Education is due to be reapportioned or the voting method changed. It is further ORDERED that any elections for the County Board of Education under the present system (Act 41, 1966 Special Session) or the immediately preceding system (Act 141, 1949 Regular Session) be, and hereby are, enjoined.

It is further ORDERED that Act 141, 1949 Regular Session of the Alabama Legislature, insofar as it establishes the apportionment of Board of Education districts, is unconstitutional and void.

It is further ORDERED that Act 41, 1966 Special Session, insofar as it establishes the apportionment of of Board of Education districts, is unconstitutional and void.

It is further ORDERED that the County Democratic Executive Committee proceed is reapportion itself to remove the constitutionally impermissible

disparities. The Committee is hereby directed to submit a plan of reapportionment along the principles of "one man, one vote" to the Court for approval.

It is further ORDERED that jurisdiction of this cause be, and the same hereby is, retained until constitutionally acceptable apportionment plans for the County Commission and the Board of Education are enacted into law and approved by the Court, and until an acceptable apportionment plan for the County Democratic Executive Committee is submitted to and approved by the Court.

The Court will hold the case in abeyance from this point in order to give the legislative process an opportunity to correct outstanding apportionment problems in Pickens County without further judicial intervention.

Done this 23rd day of January, 1975.

S/FRANK H. McFADDEN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

ALABAMA, WESTERN DIVISION

JAMES H. CORDER, et al.,

Plaintiffs;

v.

ROBERT H. KIRKSEY, et al.,

Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed March 12, 1976]

ORDER

This cause came before the Court on the motion of defendants Robert H. Kirksey, individually and as Probate Judge of Pickens County: H. Hope Wheat, individually and as Circuit Clerk and Register of Pickens County; Louie C. Coleman; individually and as Sheriff of

Pickens County; and W. W. Curry, Jr., Travis Fair, Groce Pratt and Richard Walters, individually and as the County Commissioners of Pickens County, for the Court to enter an order approving the plan of apportionment of the Commissioners' Districts of Pickens County as set forth in Act No. 594, House Bill No. 1566, passed by the 1975 Regular Session of the Alabama Legislature and approved by the Governor of Alabama on October 1, 1975. This cause is before the Court also on plaintiffs' motion for injunctive relief.

Plaintiffs have no objection to the County Commissioners' Districts as drawn by Act No. 594 but in their motion for injunctive relief have moved the Court to alter the method by which the individual commissioners are elected.

The Court has considered the motions, the plan of apportionment set forth in Act No. 594, the pleadings and other papers on file in this case, the briefs and argument of counsel, the applicable law and the evidence received in open court. The Court is of the opinion that the plan of apportionment of the Commissioners' Districts of Pickens County set forth in Act No. 594 is constitutional and should be approved. The Court is further of the opinion that the request for relief as to the County Commission made by plaintiffs in their motion for injunctive relief should be denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the plan of apportionmtne of the Commissioners' Districts of Pickens County as set forth in Act No. 594 of the 1975 Regular Session of the Alabama Legislature is constitutional

and hereby approved.

It is ORDERED further that the request for relief as to the County Commission made by plaintiffs in their motion for injunctive relief is hereby denied.

Done this 12th day of March, 1976.

S/FRANK H. McFADDEN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

ALABAMA, WESTERN DIVISION

JAMES H. CORDER, et al.,
Plaintiffs;

v.

ROBERT H. KIRKSEY, et al.,
Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed March 17, 1976]

ORDER

Pursuant to the Court's order of January 23, 1975, defendant Pickens County Board of Education has filed its response and report to the Court seeking approval of the plan of apportionment for the Board of Education as set forth in Act No. 72, Senate Bill No. 9, passed by the 1975 Fourth Special Session of the Alabama Legislature and approved by

the Governor of Alabama on November 14, 1975. This cause is before the Court also on plaintiff's motion for injunctive relief.

The Court has been informed that the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 has objected to the plan of apportionment as set forth in Act No. 72. The Court is of the opinion that this plan cannot be enforced and declines to approve the plan. The Court is further of the opinion that under the circumstances, particularly the impending primary election to be held on May 4, 1976, for which candidates must qualify by March 19, 1976, the Court must fashion a plan of apportionment for the Pickens County Board of Education.

Although there is a preference for single-member districts when a court is called upon to fashion a plan of appor-

tionment, this Court finds that there are unusual circumstances which justify adoption of a modified single-member district plan. First, the short period of time remaining before the primary election is not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. Secondly, although the four Commissioners' Districts of Pickens County are constitutionally apportioned, the Court declines to order the reduction of the Board of Education to four members. Thirdly, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and while the zones are not congruent with the Commissioners' Districts, there is a substantial overlap.

Having considered the response and report of the Board of Education, the

motion, the pleadings and other papers on file in this case, the briefs and argument of counsel, the applicable law and the evidence presented in open court, the Court is of the opinion that one member of the Pickens County Board of Education should reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member should be nominated and elected at-large without regard to the place of residence within Pickens County.

Accordingly, it is ORDERED, ADJUDGED and DECREED that henceforth one member of the Pickens County Board of Education shall reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member shall be nominated and elected at-large without regard to be place of residence within Pickens County, according to the

following schedule:

Member at large	1980
District 1	1976
District 2	1978
District 3	1980
District 4	1976

It is ORDERED further that in all other respects the request for relief as to the Board of Education made by plaintiffs in their motion for injunctive relief is hereby denied.

Done this 17th day of March, 1976.

S/FRANK H. McFADDEN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

ALABAMA, WESTERN DIVISION

JAMES H. CORDER, and HARRY WESTERN,

Plaintiffs;

v.

ROBERT H. KIRKSEY, et al.,

Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed August 18, 1976]

ORDER

This cause is before the Court on plaintiffs' motion for entry of a final judgment with respect to their claims against the Pickens County Commission and Pickens County Board of Education. Having considered the motion, the Court

has determined that there is no just reason for delay in the entry of a final order and judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure pursuant to the determinations made herein and in the Court's orders of March 12, 1976 and March 17, 1976, and that the motion is due to be granted.

Accordingly, it is finally ORDERED, ADJUDGED and DECREED:

1. That henceforth one member of the Pickens County Board of Education shall reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member shall be nominated and elected at-large, without regard to the place of residence within Picken County, according to the following schedule:

Member at Large: 1980,

District 1: 1976,

District 2: 1978,

District 3: 1980,

District 4: 1976.

2. That in all other respects the plaintiffs' request for relief as to the Board of Education is hereby denied, except that plaintiffs' request for an award of attorneys' fees is reserved for later decision.

3. That the plan of apportionment of the Commissioners' Districts of Pickens County as set forth in Act No. 594 of the 1975 Regular Session of the Alabama Legislature is constitutional and hereby approved.

It is further ORDERED that plaintiffs' request for relief as to the County Commission is hereby denied, except that plaintiffs' request for an award of attorneys' fees is reserved for later decision.

Done this 18th day of August, 1976.

S/FRANK H. McFADDEN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION

JAMES H. CORDER and HARRY WESTERN,

Plaintiffs,

v.

ROBERT H. KIRKSEY, et al.,

Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed August 26, 1976]

AMENDED ORDER

The final judgment and order heretofore entered on August 18, 1976 is withdrawn and in its stead the following order is entered.

This cause is before the Court on plaintiffs' motion for entry of a final judgment with respect to their claims

against the Pickens County Commission and Pickens County Board of Education and the election officials of the county, consisting of Robert H. Kirksey, Probate Judge of Pickens County H. Hope Wheat, Circuit Clerk and Register of Pickens County, and Louie C. Coleman, Sheriff of Pickens County. Having considered the motion the Court has determined that there is no just reason for delay in the entry of a final order and judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure pursuant to the determinations made herein and in the Court's orders of March 12, 1976 and March 17, 1976, and that the motion is due to be granted.

Accordingly, it is finally ORDERED, ADJUDGED and DECREED:

1. That henceforth one member of the Pickens County Board of Education

shall reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member shall be nominated and elected at-large, without regard to the place of residence within Pickens County, according to the following schedule:

Member at Large:	1980;
District 1:	1976;
District 2:	1978;
District 3:	1980;
District 4:	1976.

2. That the defendant election officials shall implement the election of the Board of Education in conformity with this order.

3. That in all other respects the plaintiffs' request for relief as to the Board of Education is hereby denied, except that plaintiffs' request for an award of attorneys' fees is reserved for later decision.

4. That the plan of apportionment of the Commissioners' Districts of Pickens County as set forth in Act No. 594 of the 1975 Regular Session of the Alabama Legislature is constitutional and hereby approved, and the defendant election officials are directed to conduct the election for members of the County Commission in conformity with the aforesaid Act and this order.

It is further ORDERED that plaintiffs' request for relief as to the County Commission is hereby denied, except that plaintiffs' request for an award of attorneys' fees is reserved for later decision.

Done this 26th day of August, 1976.

s/Frank H. McFadden
Chief Judge

[585 F.2d 708]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 76-3601

JAMES H. CORDER and HARRY W. WESTERN, on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants,

v.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Alabama

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(NOVEMBER 16, 1978)

Before TJOFLAT, HILL and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

Black residents of Pickens County, Alabama, brought this action to challenge the electoral schemes for the county commission, board of education, and Democratic Executive Committee. The plaintiffs contested the districting of all three bodies on the basis that the districts did not satisfy the "one person, one vote" mandate of the fourteenth amendment to the Constitution. See generally Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964). They also questioned the at-large method of election county commissioners and school board members[1]; the plaintiffs alleged that

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1. The commissioners were nominated by district but elected by the county at-large. All members of the school board were nominated and elected at-large, but all except the chairman were required to reside in separate districts corresponding to the commission districts. For a more

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this feature of the electoral process operated to dilute the black vote in Pickens County. See generally Nevett v. Sides, 571 F.2d 209, 215-17 (5th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3247 (U.S. Sept. 22, 1978) (No. 78-492). The plaintiffs' case, therefore, sounded in both genres of reapportionment actions: the "quantitative" (one person, one vote) and the "qualitative" (dilution).[2] See id. at 215-16.

FOOTNOTE CONTINUED---detailed discussion of these schemes, see Part I infra.

2. The issue in a quantitative reapportionment case is whether population deviations from the ideal or average district are impermissibly large. See, e.g., Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979 (1973); Nevett v. Sides, 571 F.2d at 215. The theory of the qualitative reapportionment action is more subtle and abstruse. This action alleges that district lines were drawn or erased so as to diminish the political input of a cognizable element of the voting population. Qualitative actions include the familiar gerrymander case, e.g., Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct.

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The plaintiffs moved for partial summary judgment on their quantitative claims. The district court granted the plaintiffs' motion, enjoined the acts under which the county commission and board of education districts were apportioned, and invalidated the Democratic Executive Committee's apportionment. The court held the case in abeyance "in order to give the legislative process an opportunity to correct outstanding apportionment problems in Pickens County without further judicial intervention." Record, vol. 1, at 53.

FOOTNOTE CONTINUED---125 (1960); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974), and the voting dilution case, e.g., White v. Regester, 412 U.S. 755, 93 S.Ct. 2332 (1973); Nevett v. Sides.

The Alabama legislature responded by enacting plans for the county commission and board of education. The legislature redrew the commission districts but continued the at-large method of election. The school board residence districts were abolished, and the members ran at-large as before. See note 1 supra. The Democratic Executive Committee resolved itself to comply with the court's order by tying its districting into that to be approved for the county commission.[3]

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3. The Democratic Executive Committee adopted a resolution that apportioned eight committee members to each of the four county commission districts established by the legislature. The court approved the legislature's districting, and neither the plaintiffs nor the defendants challenge the lines the legislature drew; the plaintiffs' appeal goes only to the method of electing the commissioners. Since the executive committee's apportionment ties into a districting scheme that is not contested by the parties to this appeal, the issue of its propriety is not before us.

The court approved the legislature's action as to the county commission but declined to accept the plan for the board of education because the Attorney General of the United States, acting pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (1970), had interposed an objection to that plan. Due to the imminence of the school board elections, the Court fashioned its own apportionment scheme for the board. Its plan consisted of four single-member districts, corresponding to the nominating districts of the county commission, and one at-large district.

The plaintiffs appeal the judgment of the district court on two grounds. First, they claim that the district court erred in providing an at-large seat for the board of education. Second, they assert that the court was incorrect in

validating the commission plan. We hold that the district court failed to set forth sufficiently its justifications for employing the at-large school board seat, and therefore we remand with instructions that the district court make justifying findings. As regards the second ground, we conclude that the court erred by omitting to make adequate findings of fact as to the constitutionality of the commission plan; therefore, we remand to enable the district court to make appropriate findings.

I

The electoral schemes that are the subject of this litigation are unusual and complex. We think it profitable to discuss them in some detail, and, because the county commission districts form the basis for the school board's

apportionment, we shall begin with the commission.

A

At the inception of this suit on November 15, 1973, Pickens County was divided into four separate commission districts.[4] Each district nominated candidates for its seat. In the general election, however, these nominees ran county-wide; all the voters in Pickens County had the opportunity to vote for a candidate for each seat.[5] The Pickens

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4. The commission districts were drawn by the legislature in 1923, 1923 Ala. Acts No. 156, and were unchanged until the court's order in this suit.

5. This at-large method of election was established in 1935. 1935 Ala. Acts No. 278. From 1923, when the legislature defined the commission districts, see note 4 supra, until 1935, the commissioners were elected from single-member districts. In 1967, the legislature repealed Act 278 but reenacted provisions identical to those of Act 278. 1967 Ala. Acts No. 141.
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County Probate Judge served ex officio as the fifth member and chairman of the commission.

As we briefly sketched above, the plaintiffs attacked this scheme at two levels. First, they alleged that the districts from which the commission candidates were nominated were malapportioned. Second, they claimed that the at-large feature of the general election acted to dilute the votes of blacks in Pickens County, who in 1973 constituted forty-two percent of the population and twenty-nine percent of the registered voters of that county.

FOOTNOTE CONTINUED-----On October 20, 1967, Act 141 was submitted to the Attorney General of the United States, as provided by §5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (1970). He approved the Act on December 18, 1972. As the language of §5 establishes, the Attorney General's approval does not bar an action, such as this, to enjoin procedures subject to §5 clearance.

The district court agreed that the nominating districts did not satisfy the quantitative apportionment standards of the fourteenth amendment, held applicable to local governmental entities by the Supreme Court in Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114 (1968). Hence, on January 23, 1975, the court invalidated the act under which the county commission had been apportioned and enjoined commission elections until the Alabama legislature drew new districts. The court did not at this time pass upon the constitutionality of the at-large feature of the general elections for county commission.

On August 21, 1975, the Alabama legislature passed an act redistricting the commission, 1975 Ala. Acts No. 594, but not affecting the method of election. The Governor signed the bill on October

1, 1975, and the county commission moved the court to approve Act 594.[6] On March 6, 1976, the court conducted an evidentiary hearing on the merits of the plaintiffs' prayer to enjoin the at-large feature of the commission. In an order dated March 12, 1976, the district court approved Act 594, whose districting met the plaintiffs' approval. The court upheld the at-large method of electing commissioners in the general election and thus denied the plaintiffs' motion for injunctive relief.

The plaintiffs appeal the ruling of the court upholding the at-large method of election. We conclude that the

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6. The record reflects that Act 594 was submitted to and approved by the Attorney General pursuant to §5 of the Voting Rights Act of 1965, see note 5 supra. Record, vol. 2, at 47-48.

district court failed to make sufficient findings of fact for us to determine whether the at-large feature operated impermissibly to dilute the votes of blacks.

In upholding the at-large aspect of the commission elections, the court made absolutely no findings of fact. It merely stated,

> The Court has considered the motions, . . . the pleadings and other papers on file in this case, the briefs and argument of counsel, the applicable law and the evidence received in open court. . . . The Court is . . . of the opinion that the request for relief as to the County Commission made by plaintiffs in their motion for injunctive relief should be denied.

Record, Vol. 1, at 76-77. As several cases of this circuit decided since the district court entered its order of March 12 demonstrate, this conclusory language is grossly inadequate.

The most recent applicable precedent

is Blacks United for Lasting Leadership v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978). In Shreveport, a suit challenging the at-large election of that city's commission, we found the district court's findings inadequate to satisfy Fed. R. Civ. P. 52(a), which requires the district court, in cases tried without a jury, to "find the facts specially and state separately its conclusions of law thereon."[7] We observed that the need for

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7. We fully recognize that the final sentence of rule 52(a) excepts dispositions of motions from the requirement that findings of fact be specially stated. Although the district court phrased its disposition as a denial of the plaintiffs' "motion" for injunctive relief, the court's action was in reality a resolution of the case on the merits. Indeed, the plaintiffs sought in their original complaint to enjoin tha at-large aspect of the county commission elections, and this feature of the commission plan remained unchanged by Act 594. See text accompanying note 6 supra. An evidentiary hearing was held in open court at which testimony and exhibits were received on the merits of the plaintiffs' prayer for injunctive relief. Without

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specific factual determinations has special significance in qualitative reapportionment cases alleging dilution, because such cases are "founded . . . upon 'an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise.'" 571 F.2d at 255 (quoting White v. Regester, 412 U.S. 755, 769-70, 93 S.Ct. 2332, 2341 (1973)). In three other dilution cases, Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977), David v. Garrison, 553 F.2d 923 (5th Cir. 1977), and Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976), we held that district courts had similarly made inadequate findings of fact and remanded

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FOOTNOTE CONTINUED-----consideration of further evidence, the court entered judgment under Fed. R. Civ. P. 54(b). Therefore, we find the mandate of rule 52(a), requiring a special statement of the findings of fact, fully operative here.

the cases for additional findings.

These precedents require us to remand to the district court that aspect of the case concerning the constitutionality of the at-large commission races. We offer the following words to guide the court on remand. The court should apply the precepts set forth by this court sitting en banc in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083 (1976). Zimmer requires district courts to consider certain primary and enhancing criteria in deciding dilution cases.[8] Essentially,

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8. The Zimmer court established two categories of inquiry in cases alleging dilution of a group's voting power: one composed of "primary" criteria and concerning the history and performance of the at-large plan, the other containing "enhancing" factors and going to the existence of certain systemic devices that may enhance the underlying dilution.
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these criteria establish categories of circumstantial evidence that the district court must specifically consider both separately and in the aggregate. As we said in Nevett v. Sides, 571 F.2d 209, 226 (5th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3247 (U.S. Sept. 22, 1978) (No. 78-492):

> The ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group. Zimmer establishes certain subissues, the criteria, that a trial court must address

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FOOTNOTE CONTINUED-----The primary factors include the group's access to the political processes, e.g., slating, the responsiveness of the governing body to the particularized needs of the group; the gravity of the state policy behind the at large method of election; and the [illegible]nt effect of past discrimination upon [illegible]oup's ability to participate in the [illegible]oral process. Zimmer, 485 F.2d at [illegible] The enhancing criteria are the [illegible] of the at-large district; the portion of vote required for election, i.e., majority or plurality; the presence or lack of an anti-single shot rule, and whether candidates must reside in sub-districts. Id.

> before it can reach the ultimate issue of dilution. In essence, the criteria are directions that tell the trial court what type of circumstantial evidence can make out a dilution case. The court must address each subissue, if relevant to the particular case at hand, and determine whether the evidence under that criterion weighs in favor of or against a finding of dilution. The court is next to view the evidence as a whole, i.e., 'in the aggregate,' Zimmer, 485 F.2d at 1305, giving due regard to the significance and strength of the finding under each subissue, to determine if the ultimate inference of dilution is permissible, and, if so, whether the evidence preponderates in its favor.

(Footnote omitted.) See Shreveport, 571 F.2d at 251, 255. Given the intensely factual nature of voting dilution cases, we, as an appellate court, can but speculate whether the law was properly applied if we lack sufficiently explicative findings.

To avoid unneccessary delay, we shall retain jurisdiction over the case. We

direct that the district court make the required findings within sixty days of the receipt of our mandate, whereupon the parties shall make them a part of the record in this appeal.

B

We consider next the district court's remedy in apportioning the board of education. Under the legislative provision in force when this suit was brought, 1966 Ala. Acts Spec. Sess. No. 41, the board was composed of five members. Four members were required to reside in the four commission districts (each in a separate district), although they were nominated and elected by the county at-large. The fifth member, the chairman, was elected at-large with no residency

requirement.[9]

Act 41 was not submitted to the Attorney General for approval and was not the subject of a declaratory judgment action in the United States District Court for the District of Columbia. Therefore, Act 41 was not legally operative for failure to comply with section 5 of the 1965 Voting Rights Act. See Connor v. Waller, 421 U.S. 656, 95 S.Ct. 2003 (1975); United States v. County Commission, 425 F. Supp. 433, 436 (S.D. Ala. 1976) (three-judge court), aff'd mem., 97 S.Ct. 1540 (1977).

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9. This somewhat unusual scheme resulted from the reduction of the number of high schools in Pickens County from five to four. Prior to the effective date of Act 41, the school board members were elected from five single-member districts, which corresponded to the five high school attendance zones. 1949 Ala. Acts No. 141.

By order dated January 23, 1975, the district court declared Act 41 unconstitutional.[10] Subsequently, the legislature enacted a provision retaining the at-large method of electing the school board, 1975 Ala. Acts 4th Spec. Sess. No. 72, which was signed by the Governor on November 14, 1975. Act 72 was submitted to the Attorney General under section 5, and he interposed an objection. Cognizant of the Attorney General's action, the district court heard testimony on the issue of the board's apportionment at the March 6, 1976, hearing. In the order of March 17, the court stated, "The Court is of the opinion that [Act 72] cannot be

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10. The court noted that Act 41 had not been approved as required by §5 and therefore declared the predecessor to Act 41, 1949 Ala. Acts No. 141, unconstitutional as well. See note 9 supra.

enforced and declines to approve the plan." Record, vol. 1, at 78. In view of the impending March 19 deadline for qualification for candidacy in the school board elections, the court felt compelled to fashion its own apportionment plan. It is this plan the plaintiffs find objectionable.

The district court's order calls for a five-member board, four of whom are elected from single-member districts corresponding to the approved commission districts. The fifth, the chairman, is elected by the county at-large. The parties do not challenge the district court's invalidation of Act 72; therefore, the only issue before us is the propriety of the court's remedial order.

The Supreme Court has repeatedly admonished district courts required to draw apportionment plans to avoid the

employment of at-large districts[11] absent

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11. Many of the precedents we cite in this discussion concern court-ordered multimember districts. E.g. Chapman v. Meier, 420 U.S. 1, 95 S.Ct. 751 (1975); Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979 (1973). A multimember district, taken individually, is an at-large district: more than one representative is elected by that district as a whole. "Multimember scheme," as the term is generally used, denotes an apportionment plan in which there are coordinate districts, at least one of which has more than one representative. Carpeneti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666, 670 & n. 24 (1972). For example, a state legislature may have several districts who populations entitle them to more than one legislator. See, e.g., Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858 (1971). Representatives are apportioned among the districts in proportion to their populations. See, e.g., Fortson v. Dorsey, 379 U.S. 433, 436-37, 85 S.Ct. 498, 500 (1965). But cf. Banzhaf, Multi-Member Electoral Districts--Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309 (1966) (arguing on mathematical grounds that proportional distribution overrepresents multimember districts). Hence, a multimember plan differs from a purely at-large scheme as we use the term "at-large," in that the former generally contains more than one district while the latter consists of only one district. (We refer to electoral districts and not to nominating or residential subdis-

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FOOTNOTE CONTINUED---tricts.) Another distinction is that an at-large district may have only one at-large representative --the district court's school board plan is an example--but a multimember district, by definition, has more than one representative elected by the district as a whole.

The precedents have applied the same standards to the remedial orders of the district courts, whether those orders create at-large or multimember districts. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083 (1976) (at-large); Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760 (1971) (multimember). Both devices suffer from some of the same "practical weaknesses": the number of candidates may confuse voters (assuming more than one at-large representative), residents in particular areas within the district may feel deprived of particularized representation, and cognizable minority groups may be submerged in large electorates. Chapman v. Meier, 420 U.S. 1, 15-16, 95 S.Ct. 751, 760 (1975); Whitcomb v. Chavis, 403 U.S. at 158-59, 91 S.Ct. at 1877. Some criticisms applicable to typical multimember districts, however, are not pertinent to at-large plans. The hypothesis that multimember districts are overrepresented, when compared to coordinate single-member districts, because of bloc voting in the multimember delegation or invalid apportionment theory, see Whitcomb v. Chavis, 403 U.S. at 144-48, 91 S.Ct. at 1869-71; Banzhaf, supra, is irrelevant to at-large plans. By definition, at-large plans contain no coordinate electoral districts. On the other hand, the benign use of multimember

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"special circumstances."[12] East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639, 96 S.Ct. 1083, 1085 (1976); Chapman v. Meier, 420 U.S. 1, 21, 95 S.Ct. 751, 763 (1975); see Wise v. Lips-

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FOOTNOTE CONTINUED---districts may avoid a dilution problem inherent in a comparable at-large scheme; a minority area may be apportioned a coordinate district, thus enabling the minority to elect at least one representative. Cf. United Jewish Organizations v. Carey, 430 U.S. 144, 97 S.Ct. 996 (1977) (benign gerrymander held constitutional). Although we note these distinctions, which are by no means exhaustive, we leave for another day the question whether a district court might be justified in employing one type of plan but not the other.

12. As regards the application of this principle, the Supreme Court has refused to differentiate between remedial provisions ordered in cases disestablishing single-member districts found to violate the quantitative parity principle and those ordered in cases, such as this, striking down at-large systems held to offend the qualitative equality precept. Wise v. Lipscomb, ___ U.S. ___, ___ n.5, 98 S.Ct. 2493, 2498 (1978).

comb, ___ U.S. ___, ___, 98 S.Ct. 2493, 2497 (1978); Connor v. Finch, ___ U.S. ___, ___, 97 S.Ct. 1828, 1834 (1977). Such special circumstances encompass "only the rare, the exceptional, not the usual and diurnal," Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), and single-member districts are the rule "absent insurmountable difficulties." Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762 (1971); Paige v. Gray, 538 F.2d 1108, 1111 (5th Cir. 1976). The Court's distaste for at-large and multi-member remedial districting derives not only from the "practical weaknesses inherent in such schemes," Chapman v. Meier, 420 U.S. at 15, 95 S.Ct. at 760; see note 11 supra, but also from the fact that "[w]hen the plan is court ordered, there often is no state policy of multimember districting which might deserve respect or deference." Id. at

19, 95 S.Ct. at 762.

In only one case has the Supreme Court found the "singular combination of unique factors" that would justify a federal court's employment of an at-large or multimember seat.[13] Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989 (1973). In Howell, the Court emphasized that the district court had been confronted with "plausible evidence of substantial malapportionment" and "the fear that too much delay would have seriously disrupted [imminent] elections." Id. The Court held that the district court had not

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13. The Supreme Court has recently upheld an at-large plan enacted by a local districting body in the wake of a federal court's invalidation of a pre-existing at-large system. Wise v. Lipscomb, ___ U.S. ___, 98 S.Ct. 2493 (1978). Where the local body drafts and enacts a reapportionment plan containing at-large seats, its actions are not governed by the strict "special circumstances" standards applicable to federal district courts fashioning like plans. Local plans need satisfy only the Constitution. Id. at ___, 98 S.Ct. at 2500.

abused its discretion in employing an at-large districts "in fashioning an interim remedy." Id.

In its March 17, 1976, order the district court below found "unusual circumstances" that it felt justified "adoption of a modified single-member district plan." Record, vol. 1, at 79. The court enumerated three circumstances:

> First, the short period of time remaining before the primary election is not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. Secondly, although the four Commissioner's Districts of Pickens County are constitutionally apportioned, the Court declines to order the reduction of the Board of Education to four members. Thirdly, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and while the zones are not congruent with the Commissioner's Districts, there is a substantial overlap.

Id. We find the court's language somewhat opaque, and we are unable to discern whether sufficient justification exists for the employment of the at-large seat. Therefore, we remand this portion of the case for additional findings.

We think the court's first and third circumstances might indeed justify its decision not to apportion the county into five single-member districts. We recognize that in Mahan v. Howell the Supreme Court gave substantial justifying weight to the urgency of impending election deadlines. But in Howell, the district court was forced to create a multimember district to avoid the continuation of malapportioned legislative districts. Here, the district court already had before it four commission districts that it had found met quantitative standards. Indeed, in its plan for the school

board the court apportioned single-member seats to these four districts. It appears to us that the obvious, simple, and expeditious solution would have been for the court merely to eliminate the at-large seat.

The district court does not tell us why the obvious solution was rejected. The court merely stated, in its second justifying circumstance, that it declined to reduce the size of the board. This gloss is inadequate to substantiate the district court's decision to establish the at-large seat. "[I]t is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted." Chapman v. Meier, 420 U.S. 1, 27, 95 S.Ct. 751, 766 (1975). The court's findings lack this precise articulation.

This is not a case where we feel justified in determining from the record before us whether sufficient reasons exist for deviating from the strong preference for single-member remedial districting. See Paige v. Gray, 538 F.2d 1108, 1112 (5th Cir. 1976). But cf. Wallace v. House, 538 F.2d at 1144-46 (declining to remand for finding whether special circumstances require court-ordered at-large district). Moreover, remand for additional findings on the propriety of the at-large seat will not be a substantial burden on the district court because we have already decided to remand for findings on the issue of the constitutionality of the at-large commission seats.

In conformance with our remand concerning the commission apportionment plan, we shall retain jurisdiction as to

the school board issue as well. We direct that the district court make its findings within sixty days of the receipt of our mandate, whereupon the parties shall make them a part of the record in this appeal.

II

For the foregoing reasons, we remand the case to the district court for proceedings as directed by this opinion. We retain jurisdiction over the cause. Let the mandate issue forthwith.

REMANDED

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
ALABAMA WESTERN DIVISION

JAMES H. CORDER and HARRY W. WESTERN,
on behalf of themselves and all others
similar situated,

Plaintiffs,

v.

ROBERT H. KIRKSEY, Ind. and as Probate
Judge of Pickens County, et al.,

Defendants.

C.A. 73-M-1086

[Filed February 16, 1979]

MEMORANDUM OPINION

By order dated November 16, 1978, the Court of Appeals remanded this matter for further findings. This memorandum opinion is issued in lieu of findings pursuant to Rule 52 Fed. R. Civ. P.

This case challenged the apportionment scheme of the Pickens County, Alabama County Commission, Board of Education and Democratic Executive Committee. The thrust of the complaint was directed toward the disparity in population of the election districts and a contention that election in multi-member districts diluted the voting strength of blacks.

The court, by order dated January 23, 1975, held unconstitutional the then existing legislative act, Act 141, 1967 Regular Session, setting up the election districts for the Pickens County Commission because it violated the doctrine of one-man, one-vote. The court also invalidated the election scheme for the Board of Education and that of the County Democratic Executive Committee. It directed the Democratic Executive Committee to reapportion itself and held the case in abeyance in order to give the

legislative process an opportunity to correct outstanding apportionment problems in Pickens County with respect to the County Commission and the Board of Education without further judicial intervention. The court was of the opinion that it should give the Legislature an opportunity to correct the imbalance with respect to the two legislatively created boards.

> [R]eapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Reynolds v. Sims, 377 U.S. 533, 586, 84 S.Ct. 1362, 1394 (1964). See also Burns v. Richardson, 384 U.S. 73, 83, 86 S.Ct. 1286, 1292 (1966).

COUNTY COMMISSION

By order dated March 12, 1976,

the court approved the plan of apportionment of the Commissioner's districts of Pickens County as set forth in Act No. 594, H.B. 1566, passed by the 1975 Regular Session of the Alabama Legislature and approved by the Governor of Alabama on October 1, 1975. This plan provided for four Commissioner districts of substantially equal population. Candidates are nominated from each district but are elected in the general election on an at-large basis. The fifth member of the commission is the probate judge.

Plaintiffs' present objection to the Commissioners' plan is to the at-large general election, which they claim dilutes the voting strength of the blacks.

At-large election procedures are not per se unconstitutional. Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858,

1868 (1971); Nevett v. Sides, 571 F.2d 208, 222 (5th Cir. 1978); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

In order to carry their burden of showing a dilution of voting strength, plaintiffs must show either a racially motivated plan, or that the apportionment scheme would operate to minimize or cancel out the voting strength of the black voters. Zimmer v. McKeithen, supra.

According to 1970 Census figures, Pickens County had a population of 20,326. There were 11,854 whites (58%) and 8,466 (42%) blacks. The over eighteen group was 65% white and 35% black. According to 1974 registration figures, there were 11,699 registered voters in the county, 30% black and 70% white. There is no evidence before the court with respect to a population breakdown; that is, there is no evidence about the

distribution of the black population from which an inference could be drawn with respect to the voting strength.

Applying the test of Zimmer v. McKeithen, supra, the court is of the opinion the plaintiffs have totally failed to carry the necessary burden of proof with respect to the county commission. The court is mindful of the admonition of the Court of Appeals on remand, but there is no evidence before the court on which to draw inferences that the election scheme dilutes the voting strength of blacks or that the scheme was designed to discriminate against blacks.

There are no black elected County Commissioners in Pickens County. However, as the court noted in Zimmer, a disparity between the number of minority residents and the number of minority representatives is insufficient in and of itself

to establish unconstitutionality of the statute.

The general law of Alabama provides for the at-large elections in county commission elections, but this has been modified in many instances by local acts. There is no evidence that this policy is in any way connected with racial discrimination; plaintiffs simply put no evidence on with respect to this issue.

There was no evidence of racial polarization in Pickens County. There was evidence of voter crossover, whites voting for blacks and blacks voting for whites. Plaintiff Corder testified that there were no problems in registering blacks to vote and that the Board of Registrars fully cooperated in registering blacks. There was further evidence that there was no trouble of a black getting on a ballot to run for

public office. In short, there was no proof of any denial of political access in that county to the blacks; nor was there any eivdence of discrimination in the distribution of services to blacks. There was evidence of money spent on a countywide water system provide service to all black communities, a new social service center, a new county hospital, in cooperative efforts with the Black Economic Development Council. There was evidence of black participation in all aspects of the political and community life of the county.

The only evidence plaintiffs submitted on this issue was to the effect that some rural black churches did not get paved parking lots promised for political support and there were not enough blacks in managerial positions in the county.

It does not appear to the court that the at-large general election feature contravened the Constitution and accordingly the court was loath to substitute its judgment for that of the Legislature, notwithstanding the Supreme Court's clearly stated preference for single-member districts when federal courts have to fashion a remedy. Had the court been fashioning a remedy, as in the case of the school board, I might well have opted for single-member districts as I did there; but, absent proof of impermissible discrimination in the scheme, the court did not deem it appropriate to substitute its judgment for that of the Legislature.

This court should not strike down laws merely because it believes them to be unwise. Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030 (1963).

"[C]ourts do not substitute their social and economic [and political] beliefs for the judgment of legislative bodies, who are elected to pass laws." Id. at 730, 83 S.Ct. at 1031. This Court should invalidate laws only when they are constitutionally impermissible.

In this connection, it should be noted that while the evidence is somewhat sketchy, it appears that generally speaking the elections are determined in the nominating primaries. According to the evidence, only one Republican had been elected to a county office in Pickens County. No candidate from the National Democratic Party of Alabama, the once predominantly black political party, has been elected. Nomination by the Democratic Party is generally tantamont to election. As plaintiffs stated in a memorandum submitted to the court on August 30, 1974 in

support of a motion for partial summary judgment: "Since Pickens County, like most rural counties in Alabama, has one predominant party, the results of the Democratic Primary are usually conclusive."

BOARD OF EDUCATION

The court declined to approve a reapportionment plan passed by the Alabama Legislature for the Board of Education because the Attorney General of the United States, pursuant to Section 5 of the Voting Rights Act of 1965, had objected to the plan of apportionment. The court accordingly fashioned a reapportionment plan based on the four Commissioner's districts. The court's order required the election of one member from each district, and the fifth was to be nominated and elected by the county at-large. The plaintiffs sought

sought five single-member districts. The Court of Appeals strongly suggests that the court should have used the Commissioner districts and caused the election of a four-man Board of Education.

Although there is a preference for single-member districts, when a district court is called upon to fashion a plan of apportionment, this court found and finds again that there are special and unusual circumstances which justified the adoption of a modified single-member district plan. First, the short period of time remaining before the Primary Election was not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. The deadline for qualifications was March 19, 1976. The election was to be held on May 4, 1976. The probate judge, who is responsible for the orderly

operation of the election process, testified that at least 10 to 12 different ballots would be required for the upcoming Democratic Primary as well as for the Republican Primary to be handled concurrently. To create five districts in addition to the four Commissioner districts would result in even further complicating the already difficult process.

Second, although there are four Commissioner districts which are constitutionally apportioned the court declined to order the reduction of the Board of Education to four members. Neither party suggested this alternative and the court was and is of the opinion that it should not alter the composition of the Board created by the Legislature unless compelled to do so by overriding constitutional considerations. Under Alabama

law, Title 52 §63, Code of Alabama (now §16-8-1, Code of 1975), a county board of education is to be composed of five members. While there is the suggestion of authority to make such alterations in a legislatively created body, this court is reluctant to do so absent compelling constitutional reasons. See Bolden v. City of Mobile, 571 F.2d 238, 246-247 (5th Cir. 1978), probable jurisdiction noted 47 U.S.L.W. 3221 (Oct. 3, 1978). Moreover, the exercise of such authority if it exists seems inapporpriate in this case. In the court's opinion, the fifth member would be an indispensable person in the Board's operation of the system. Most, if not all, decision-making bodies composed of more than one individual have an odd-number of members. Even-numbered decision-making bodies create a distinct possibility of deadlock votes.

The fifth position of the Pickens County Board of Education elected at-large is the chairman. The testimony from both sides is clear that Board members elected from a district tend to be more responsive and concerned, as they should be, with their respective school patrons. The chairman not only prevents deadlocks, but because elected at-large represents the entire county and has to be responsive to all the voters. The balancing effect of the fifth member thus is obvious to this court.

Third, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and, while the zones are not congruent with the Commissioner's districts, there is a substantial overlap. These four attendance zones are the result of a terminal

desegregation order issued in the case of Lee v. Macon County, C.A. 604-E (M.D. Ala., June 12, 1970). These zones are centered around the four cities of Pickens County (Aliceville, Carrollton, Gordo and Reform). The only four high schools and related feeder schools are located in these same cities and zones. The election scheme of Board members has followed the high school attendance zones since at least 1949. A fifth single-member district would create a situation where one of the five districts has either no schools in it or parts of two or more such attendance zones. The imbalance of such a scheme is inherent.

S/FRANK H. McFADDEN
Chief Judge

February 16, 1979

[625 F.2d 520]

JAMES H. CORDER and HARRY W. WESTERN on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants;

v.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County, et al.,

Defendants-Appellees.

No. 76-3601

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

Aug. 21, 1980

Appeal from the United States District Court for the Northern District of Alabama; Frank H. McFadden, Judge.

Before TJOFLAT, HILL and FAY, Circuit Judges.

PER CURIAM:

On November 16, 1978, we remanded this case, instructing the district court,

in part, to make findings of fact, see Fed.R.Civ.P 52(b), as to the constitutionality of the at-large method of electing the members of the Pickens County, Alabama, Commission. Corder v. Kirksey, 585 F.2d 708 (5th Cir. 1978). We instructed the district court to "apply the precepts set forth by this court sitting en banc in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct 1083, 47 L.Ed.2d 296 (1976)." Id., at 712. The district court has made its Zimmer findings; meanwhile, the Supreme Court's decision in City of Mobile, Ala. v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), has cast some doubt on the continued vitality of the Zimmer rationale, as explicated in Nevett v.

Sides, 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951, 100 S.Ct 2916, 64 L.Ed.2d 807 (1980) (Nevett II), as the appropriate approach to be taken, in this circuit, in analyzing the evidence in voter-dilution cases to determine whether purposeful discrimination has occurred within the meaning of the fourteenth and fifteenth amendments.

Accordingly, we remand the case once again to enable the district court to reexamine the evidence, and its findings, in the light of City of Mobile, Ala. v. Bolden, supra, and to entertain any application plaintiffs may care to make to present further evidence on their claim that the at-large method of electing the county commissioners is unconstitutional.

The district court shall accomplish the proceedings on remand within 30 days

of receipt of the mandate, which shall issue forthwith. We continue to retain jurisdiction over the cause.

REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA WESTERN DIVISION

JAMES H. CORDER and HARRY W. WESTERN, on behalf of themselves and all others similarly situated,

Plaintiffs;

v.

ROBERT H. KIRKSEY, ind. and as Probate Judge of Pickens County, et al.,

Defendants

C.A. 73-M-1086

[September 24, 1980]

ORDER

This case has again been remanded by the Fifth Circuit "to enable the district court to reexamine the evidence and its findings in the light of City of Mobile Ala. v. Bolden, [446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)], and to entertain any application plaintiffs may

care to make to present further evidence on their claim that the at-large method of electing the county commissioners is unconstitutional."

Plaintiffs have declined the court's invitation to present further evidence.

Plaintiffs attack on the present voting scheme was on the at-large election of members of the county commission nominated from discrete equally apportioned districts on the ground that this diluted the voting strength of blacks in contravention of the fourteenth and fifteenth amendments to the United States Constitution. The court held in its last opinion that this had not been proved. There the court said: ".... there is no evidence before the court on which to draw inferences that the election scheme dilutes the voting strength of blacks or that the scheme was designed to discriminate against blacks." (Emphasis

supplied.) The court is still of this opinion. Dilution is not now a test under City of Mobile, supra. The Supreme Court held that racially discriminatory motivation is necessary to sustain a claim under either the fourteenth or fifteenth amendments.

> The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See Ex parte Yarbrough, 110 U.S. 651, 665; Neal v. Delaware, 103 U.S. 370, 389-390; United States v. Cruikshank, 92 U.S. 542, 555-556; United States v. Reese, 92 U.S. 214. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon anyone," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." Id., at 217-218.
>
> Our decisions, moreover, have made clear that action by a State

> that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. . . .

100 S.Ct. 1497.

The test is substantially the same with respect to the fourteenth amendment equal protection claim.

> Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional per se, e.g., White v. Regester, 412 U.S. 755; Whitcomb v. Chavis, 403 U.S. 124; Kilgarin v. Hill, 386 U.S. 120; Burns v. Richardson, 384 U.S. 73; Fortson v. Dorsey, 379 U.S. 433. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See White v. Regester, supra; Whitcomb v. Chavis, supra, Burns v. Richardson, supra; Fortson v. Dorsey, supra. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. White v. Regester, supra, at 765-766; Whitcomb v. Chavis, supra,

at 149-150. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful device [] to further racial discrimination," id., at 149.

This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.

100 S.Ct. 1499.

As the court originally found and here reiterates, there is no evidence that the election scheme was designed to discriminate against blacks.

Accordingly, the court is still of the opinion that the challenge on the County Commission as it is presently constituted has not been sustained.

Done this 24th day of September 1980.

S/FRANK H. McFADDEN
CHIEF JUDGE

Section 2 of the Voting Rights Act, 42 USC §1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in

that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Act. No. 141, Acts of Alabama, 1967
Regular Session

Be It Enacted by the Legislature of Alabama:

Section 1. In all primary elections to be held in Pickens County for the nomination of successors to the incumbent members of the court of county commissioners of said county, candidates for membership shall be voted for only in the beats composing the district and by the qualified voters of the district proposed to be represented by such candidate or candidates, and shall be nominated by said voters of such district under such rules and regulations as may be adopted and promulgated by the governing body of the political party calling such primary election, and no person shall be eligible for such nomination unless such person resides in

the district said person proposes to represent; provided, however, that all candidates for the office of member of the court of county commissioners of said county shall be voted for at the general election by the qualified voters of the entire county.

Section 2. The members of the court of county commissioners of Pickens County for the first and third districts of said county shall be nominated at the primary election and elected at the general election held in said county during the year 1968, and every four years thereafter. Members of the court of county commissioners for the second and fourth districts of said county shall be nominated at the primary election, and elected at the general election held in said county during the year 1970 and every four years thereafter, and each

such member shall hold office for four years from the time his term of office begins after his election to such office.

Section 3. The provisions of this act are severable. If any part of the act is declared invalid or unconstitutional, such declaration shall not affect the part which remains.

Section 4. All laws and parts of laws in conflict with this act including Section 1 of Act No. 278, H. 849, Regular Session 1935 (Acts 1935, p. 167), as amended are hereby repealed.

Section 5. This act shall be inoperative and void unless it shall have been approved by a majority of the qualified electors of Pickens County who vote thereon at a referendum election held for such purpose. The election shall be held and conducted as nearly as may be in the same way as elections on

amendments to the Constitution, and shall be held on the first election day in the county not less than thirty days following final passage of this act. Notice of the election shall be given by the judge of probate of Pickens County, which notice shall be published once a week for three successive weeks before the day of the election. On the ballots to be used at the election, the proposition to be voted on shall be stated substantially as follows: "Do you favor the local law providing for the nomination of the members of the court of county commissioners by the voters of the respective districts, and for their election in the general election by the voters of the entire county? Yes ( ); No ( )." If a majority of the votes cast at the election are affirmative votes, this act shall be in full force and effect from the first

day of the second month next following the date of the election; if a majority of the votes cast are in the negative, this act shall have no further effect. The judge of probate of Pickens County shall certify the results of the election to the Secretary of State within thirty days after the returns have been canvassed.

Approved July 31, 1967.

Act No. 141, Acts of Alabama, 1949

Regular Session

AN ACT

To divide Pickens County, Alabama, into specified districts for the purpose of the selection of members of the Board of Education of said County and to provide for the election and qualification of said members, to regulate the salary of such members and to define their rights and powers.

Be It Enacted by the Legislature of Alabama:

Section 1. That Pickens County, Alabama, be divided into five districts for the purpose of electing five members of the Board of Education for said County as follows: District No. 1 or the Gordo district to be composed of Sheltons #1, Corrs #9, Gordo #10, Raleigh #16, and

Kingstore #17 beats in said County; District No. 2 or the Palmetto-Liberty district to be composed of Palmetto #2, Vails #3, Providence #4, Henrys #5, Yorkville #6 (Ethelville), and Pine Grove #24 beats in said County: District No. 3 or Reform district to be composed of Reform #8, Beards #7 (McShan), and Bostick #11 beats in said County; District No. 4 or Carrollton district to be composed of Carrollton #14, Springhill #12, Pickensville #13, and Speeds Mill #15 beats in said County, and District No. 5 or Aliceville to be composed of Aliceville #19, Olney #18, Bethany #23, Vienna #22, Cochrane #21, Memphis #20, Dancy (Whitten) #25 beats in said County.

Section 2. That this Act shall not affect the tenure in office of the present members of said Board of Education, but said members shall hold office

for the full time for which they were elected or qualified, nor shall affect the tenure in office or their successors who may be appointed in cases of the resignation, death, or removal from office, but such appointees shall fill out the full term for which their predecessors were elected.

Section 3. That one person, who shall be a resident and a qualified voter of some beat in a district, shall be elected a member of said Board of Education of the several districts of said County, and such person shall be nominated and elected by the voters of each such district and no other.

Section 4. That an election for members of Said Board of Education shall be held as follows:

For Gordo District No. 1 and Reform district No. 3 shall be elected at the

general election in the year 1950; for Palmetto-Liberty district No. 2 and Carrollton district No. 4 shall be elected at the general election held in the year 1952, and for Aliceville District No. 5 shall be elected at a general election held in the year 1954; that the terms of office of the several members of such Board of Education to be elected as aforesaid shall be for six years or until successors are elected and qualified and shall begin on the first Monday after the second Tuesday in January next after their election, and such members of said Board of Education shall qualify for said office in the way and manner now or as hereafter provided by law.

Section 5. That the rights, powers, and duties of such members of said Board of Education are such as are now or may hereafter be provided by the general

education laws of the State of Alabama, and that the members of said Board of Education as now or hereafter constituted shall receive as salary for their services as such members five dollars per day and travel expense, meal and lodging as now provided for a period not to exceed eighteen days in one year.

Section 6. That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed.

Approved June 28, 1949.

Act No. 41, Acts of Alabama, 1966

Special Session

AN ACT

Relating to Pickens County; providing further for the election of members of the county board of education, and repealing conflicting laws.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. In Pickens County the four members of the county Board of education shall be elected one each from the four commissioners districts into which the county has been divided according to law. A member shall have graduated from a high school, shall be a resident and qualified elector of the commissioners district he represents and shall reside therein during his continuance in office. However, such members

shall be nominated and elected by the qualified electors of the entire county. The president or chairman of the county board of education shall have graduated from a high school and shall be a resident and qualified elector of the county. The president or chairman and the members of the board shall be elected for terms of six years, as provided by the general laws of this state, and this Act shall not affect the tenure in office of the incumbent members of the county board of education, who shall hold office for the full term for which they were elected.

Section 2. The chairman of the board shall be elected first under this Act at the general election in November, 1968 and the member from Gordo District No. 3 shall be elected first at the same general election in November, 1968; the members from Reform District No. 1 and

from Carrollton District No. 4 shall be elected first under this Act at the general election in November, 1970 and the member from Aliceville District No. 2 at the general election in November, 1972.

Section 3. Act No. 141, S. 329, Regular Session 1949 (Acts 1949, p. 167) in conflict with this Act is hereby expressly repealed.

Section 4. The rights, powers, and duties of the chairman and members of the county board of education shall be the same as prescribed by the general laws of Alabama, Code 1940, Title 52.

Approved August 16, 1966.

Act No. 72, Acts of Alabama, 1975 Fourth Special Session

Relating to the election of members of the county board of education in counties having a population of not less than 18,500 nor more than 20,500 inhabitants according to the most recent federal decennial census, and repealing conflicting laws.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Commencing with and at the time of the next general election following the passage of this act by the Legislature of Alabama, upon its becoming part of the laws of Alabama, the member or members' places on the county boards of education in counties having a population of not less than 18,500 nor more than 20,500 inhabitants according to the most recent federal decennial census are open for

qualification, nomination and election thereto, and shall be filled according to the provisions hereinafter in Sections two, three and four.

Section 2. The county boards of education in such counties shall consist of five members who shall be designated by places as Place Number One, Two, Three, Four and Five, and may, by appropriate resolution, designate one of its members as Chairman who shall serve for one year unless re-designated as Chairman for an additional year or years and each member of the Board shall be eligible for appointment for Chairmanship. Further, the Board may, if it determines educationally advantageous, designate one of its members as having prime responsibility for each of the Board's four school attendance areas. However, nothing in this act shall be construed so as to

require the Board to make such designations. This act shall not affect the tenure and office of the incumbent members of the Board who shall hold office for the full term to which they were elected except as hereinafter provided.

Section 3. A person who shall be a resident and a qualified voter of any county to which this act applies, and having completed a high school education, or the equivalent thereof and as qualified by Section 63 of Title 52 of Alabama Statutes shall be elected for each place, including Chairman, of said Boards of Education, and such person shall be elected by the qualified electors of the various counties to which this act applies.

Section 4. The members of the Board to serve in Place Number One and

Place Number Four shall be elected first under this act at the general election in November of 1976 and the member to serve in Place Number Two shall be elected first at the general election in 1978 and the member to serve in Place Number Three and Place Number Five of the Board shall be elected first under this act at the general election in November of 1980.

Section 5. Act 141, S. 329, Regular Session 1949 (Acts 1940, p. 167) and Act 41, S. 48 (Special Session 1966), and any other act which may be in conflict with this act are hereby expressly repealed.

Section 6. There shall continue to be, by the provisions and conditions of this act, five (5) members of said Boards of Education who are elected, as herein provided; appointed, as otherwise provided by law in Title 52, Section 64,

Code of Alabama 1940; or presently serving as members of said Board. This act shall not affect the tenure or office of the present members of said Board, but said members shall hold office for the full time for which they were qualified or elected, nor shall it affect the tenure in office of their successors who may be appointed in cases of the resignation, death or removal from office, but such appointees shall fill out the full term for which their predecessors were elected.

Section 7. The election of members of the county boards of education and terms of office, rights, powers, duties and compensation for said members of the said boards are such as are now or may hereafter be provided by the general laws of Alabama, Code of 1940, Title 52.

Section 8. The provisions of this act are severable. If any part of this act is declared invalid or unconstitutional,

such declaration shall not affect the part which remains.

Section 9. All laws or parts of laws which conflict with this act are hereby repealed.

Section 10. This act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law.

November 14, 1975.

§16-8-4. Code of Alabama (1975)

Organization, regular and special meetings; rules of procedure; majority vote.

The county board of education shall hold an annual meeting each year on the third Tuesday in November. At this meeting the board shall elect each year one of its members to serve as president and one to serve as vice-president. Other regular meetings shall be held on the last Friday of February, May and September, and such special meetings may be held, at such place as the duties and the business of the board may require. The rules generally adopted by deliberative bodies for their government shall be observed by the county board of education. No motion or resolution shall be declared adopted without the concurrence of the majority of the whole board.

82-1165

NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JAMES H. CORDER and HARRY W. WESTERN, on Behalf of Themselves and all Others Similarly Situated,

Petitioners,

vs.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County; et al., etc.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

William Oliver Kirk, Jr.*
P.O. Box A-B
Carrollton, AL 35447
(205) 367-8125
CURRY & KIRK
ATTORNEYS AT LAW

**Counsel of Record*

QUESTIONS PRESENTED

Whether Section 2 of the Voting Rights Act, 42 U.S.C. §1973 is included within the scope of the Fifteenth Amendment to the United States Constitution and was considered by the Court of Appeals?

PARTIES BELOW

The following were parties below:

Plaintiffs-appellants:

James H. Corder and Harry W. Western, on behalf of themselves and all others similarly situated;

Defendants-appellees:

Robert H. Kirksey, Individually and as Probate Judge of Pickens County; H. Hope Wheat, Individually and as Circuit Clerk and Register of Pickens County; Louie C. Coleman, Individually and as Sheriff of Pickens County, Aubrey Turnipseed, Travis Fair, Groce Pratt and Richard Walters, Individually and as the County Commissioners of Pickens County; Billie F. McCool, T. B. Woodard, Jr., J. L. Stone, Marvin Elmore, and J. V. Park, individually and as members of the Pickens County Board of Education.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

Accepted as reported in petition.

JURISDICTION

The Court has jurisdiction to review the opinion below pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 2 of the Voting Rights Act 42 U.S.C. §1973. Appended hereto at Page 8a.

Section 1 of the Fifteenth Amendment to the United States Constitution. Appended hereto at Page 1a.

STATEMENT OF THE CASE

No additional Statement of the Case is being made except the following which is made to correct inaccuracies or omissions in the Statement of the Case made by the Petitioner.

Section 2 of the Voting Rights Act, 42 U.S.C. §1973 has been included in the pleadings and has been before the Court of Appeals and the District Court since the case was originally filed in 1973 and no violation of said statute was ever found.

The District Court did review this case in light of the City of Mobile v. Bolden 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47.

SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law dealing with voting rights' violations and voter dilution cases and all points of law under the Fifteenth Amendment to the United States Constitution and under Section 2 of the Voting Rights Act, 42 U.S.C. §1973 have been covered by the Courts below. There is no question of law at issue that justifies this Writ of Certiorari being granted.

ARGUMENT

The only claim of Petitioners as a reason for granting Certiorari is that the Court of Appeals did not review the record in light of Section 2 of the Voting Rights Act, 42 U.S.C. §1973. This claim is clearly erroneous. The Petitioner admits that they have claimed violation of Section 2 of the Voting Rights Act, 8a, and have presented it to the Courts below from the beginning. Said claim has been rejected by the Court at every step.

The Court of Appeals issued its opinion of March 16, 1981, and said in part: The District Court found that there was simply no facts in the record probative of racially discriminatory intent. James H. Corder, et al v. Robert H. Kirksey, et al, 639 F.2d 1195.

The Court of Appeals remanded this case back to the District Court for review in light of the City of Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47, with further instructions to entertain any application that the Plaintiffs may care to make to present further evidence on the claim that at-large method of elections of the Pickens County Commissioners were unconstitutional. Plaintiffs declined the Court's invitation to present further evidence. Order of District Court, September 24, 1980. Appended hereto at page 2a. The District Court said in that order that there was no evidence before the Court on which to draw inference that the election scheme dilutes the voting strength of blacks.

This Court said in City of Mobile v. Bolden, supra, that Section 2 of the Voting Rights Act, 8a, added nothing to the

claim under the Fifteenth Amendment to the U. S. Constitution, la. This Court further stated that it is apparent that the language of Section 2 of the Voting Rights Act does no more than elaborate upon that of the Fifteenth Amendment and that the sparse legislative history of Section 2 makes it clear that it was intended to have an effect that is no different from that of the Fifteenth Amendment itself. The view that Section 2 of the Voting Rights Act simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings and it was stated that Section 2 was almost a rephrasing of the Fifteenth Amendment.

Section 2 of the Voting Rights Act, 42 U.S.C. §1973, has been before the Court below since the original complaint was filed

in 1973.

Therefore, Section 2 of the Voting Rights Act, 42 U.S.C. §1973, has been fully considered by the Court of Appeals and the District Court and found to be complied with by the Respondents and there is nothing further for this Court to consider.

CONCLUSION

It is respectfully submitted that petitioner has wholly failed to sustain the burden of establishing that there are any special and important reasons why the Writ should be granted. The decision below did not involve an important question of federal law which has not already been settled by this Court; nor has the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of another Court of Appeals on the same manner. The Court of Appeals correctly held that the trial court's finding of facts and conclusions of law pertaining to the legislative enacted at-large scheme for election of Pickens County Commissioners did pass constitutional muster.

This Court should deny the Writ of Certiorari.

Respectfully submitted,

William Oliver Kirk, Jr.*
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CURRY & KIRK
ATTORNEYS AT LAW

Counsel for Respondents
Robert H. Kirksey, Ind.
and as Probate Judge of
Pickens County and
Commissioners of Pickens
County, et al.

* Counsel of Record

Section 1 of the Fifteenth Amendment provides:

> The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA WESTERN DIVISION

JAMES H. CORDER and HARRY W. WESTERN, on behalf of themselves and all others similarly situated,

PLAINTIFFS

V.

ROBERT H. KIRKSEY, ind. and as Probate Judge of Pickens County, et al.,

DEFENDANTS

C.A. 73-M-1086

[September 24, 1980]

ORDER

This case has again been remanded by the Fifth Circuit "to enable the district court to reexamine the evidence and its findings in the light of City of Mobile, Ala. v. Bolden, [446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980)], and to entertain any application plaintiffs may

care to make to present further evidence on their claim that the at-large method of electing the county commissioners is unconstitutional."

Plaintiffs have declined the court's invitation to present further evidence.

Plaintiffs' attack on the present voting scheme was on the at-large election of members of the county commission nominated from discrete equally apportioned districts on the ground that this diluted the voting strength of blacks in contravention of the Fourteenth and Fifteenth Amendments to the United States Constitution. The court held in its last opinion that this had not been proved. There the court said: ".... there is no evidence before the court on which to drawn inferences that the election scheme dilutes the voting strength of blacks or

that the scheme was designed to discriminate against blacks." (Emphasis supplied.) The court is still of this opinion. Dilution is not now a test under City of Mobile, supra. The Supreme Court held that racially discriminatory motivation is necessary to sustain a claim under either the Fourteenth or Fifteenth Amendments.

> The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See Ex parte Yarbrough, 110 U.S. 651, 665; Neal v. Delaware, 103 U.S. 370, 389-390; United States v. Cruikshank, 92 U.S. 542, 555-556; United States v. Reese, 92 U.S. 214. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon anyone," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race,

color, or previous condition of servitude." Id., at 217-218.

> Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose . . . .

100 S.Ct. 1497.

The test is substantially the same with respect to the Fourteenth Amendment equal protection claim.

> Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional per se, e.g., White v. Regester, 412 U.S. 755; Whitcomb v. Chavis, 403 U.S. 124; Kilgarin v. Hill, 386 U.S. 120; Burns v. Richardson, 384 U.S. 73; Fortson v. Dorsey, 379 U.S. 433. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See White v. Regester, supra; Whitcomb v. Chavis, supra, Burns v. Richardson, supra; Fortson v. Dorsey, supra. To prove such a purpose it is not

> enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. White v. Regester, supra, at 765-766; Whitcomb v. Chavis, supra, at 149-150. A plaintiff must prove that the disputed plan was "conceived or operated as (a) purposeful device () to further racial discrimination," id., at 149.
>
> This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment.

100 S.Ct. 1499.

As the court originally found and here reiterates, there is no evidence that the election scheme was designed to discriminate against blacks.

Accordingly, the court is still of the opinion that the challenge on the County Commission as it is presently constituted has not been sustained.

Done this 24th day of September, 1980.

S/FRANK H. McFADDEN
CHIEF JUDGE

Section 2 of the Voting Rights Act, 42 USC §1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United State to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election are not equally open to participation by members of a class of citizens protected by subsection (a) in

that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one "circumstance" which may be considered, provided that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

82-1165

NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JAMES H. CORDER and HARRY W. WESTERN, on on Behalf of Themselves and all Others Similarly Situated,
Petitioners,

vs.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County; et al., etc.,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, PICKENS COUNTY BOARD OF EDUCATION

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QUESTIONS PRESENTED

Respondent, Pickens County Board of Education, does not agree with the Petitioners' framing of the questions presented in this matter as specifically pertains to the Board and would therefore propose the following:

2. Whether the apportionment plan of the District Court was a legislative rather than court-ordered plan, thus, requiring preclearance under Section 5 of the Voting Rights Act as that issue was addressed by this Court in McDaniel v. Sanchez, 452 U.S. 130 (1981)?

3. Whether the District Court and Court of Appeals erred under prior decisions of this Court, Mahan v. Howell, 410 U.S. 315 (1973); Chapman v. Meier, 420 U.S. 1 (1975); and Connor v. Finch, 431 U.S. 407 (1977), in finding

here that special and unusual circumstances existed upon which a court-ordered reapportionment plan could include one at-large seat in an otherwise single-member district election scheme?

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STATUTES INVOLVED

There is an additional statute involved in the issues presented by the Petition and which is not cited by the Petitioners. The statute is Section 16-8-1, Code of Alabama (1975), appended hereto at 46a.

STATEMENT OF THE CASE

Respondent, Pickens County Board of Education, would adopt the Statement of the Case set out by Petitioners in that it refers to all of the relevant orders of the lower courts. While the Statement does not refer to the specific findings of fact which this Respondent deems pertinent to the issues presented, those findings are contained within the orders appended to this Brief in Opposition.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

At the time the District Court was first called upon to fashion a reapportionment plan for the Pickens County Board of Education, it was faced with imminent primary election deadlines on both qualification of candidates and the election itself. 26a. Additionally, the District Court found that there were other "unusual circumstances" present that justified a deviation from the preferred single-member district plan. 27a. The plan by the very language of the District Court's opinion was court-ordered and not legislatively concocted.

There are specific findings of fact set out by the District Court in its initial and remand opinions, 25a

and 30a, which leave no doubt as to the basis for its fashioning a modified single-member district plan. The Court of Appeals found favor with the reasoning of the District Court in each instance where an unusual or special circumstance had been found. 14a-24a.

A.

Neither the District Court Nor the Court of Appeals Erred in Finding that a Modified Single-Member District Election Plan Was Appropriate for the Pickens County Board of Education.

There is no conflict between the District and Court of Appeal's decisions and the prior decisions of this Court. This Court has enunciated the principle "that single-member districts are to be preferred in court-ordered ...reapportionment plans unless the

court can articulate a 'singular combination of unique factors' that justifies a different result." Connor v. Finch, 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975); Mahan v. Howell, 410 U.S. 315 (1973). This is not to say that use of multi-member districts are unconstitutional, for this Court, in Whitcomb v. Chavis, 403 U.S. 124 (1971), recognized that such multi- member districts are not per se violative of the Equal Protection Clause; instead, the enunciated principle simply means single-member districts are preferred over multi-member districts absent special circumstances. "Where important and significant (county) considerations rationally mandate departure from (single-member districts), it is the reapportioning

court's responsibility to articulate precisely why a plan of single-member districts... cannot be adopted. Chapman v. Meier, 420 U.S. 1, 27 (1975).

With this mandate specifically in mind, the Court of Appeals remanded for further findings, whereupon, the District Court opined it "found and finds again that there are special and unusual circumstances which justify the adoption of a modified single-member district plan." 41a. The reasons given were three-fold.

First, there was an extremely short period of time before the primary elections with the candidate qualification deadline being two days after the court's order and the primary election itself only six weeks later. The court

properly relied upon the testimony of the probate judge as to the difficulty of ballot preparation as matters then stood and that to have election districts for the Board separate from the Commissioners' districts "would result in even further complicating the already difficult process." 41a-42a.

There is no doubt that the first enunciated reason or circumstance relied upon by the District Court would, as the Court of Appeals so held, suffice to "justify imposition of an interim remedy, ..." and therefore it refused "to hold it as sufficiently weighty to justify a permanently established, court-fashioned at-large election plan." 17a. However, the second and third reasons of the District Court as subsequently approved by the Court

of Appeals do present justification for the plan adopted here.

The Court of Appeals focused squarely on the second reason given by the District Court in its original opinion. This reason being that the District Court "declines to order the reduction of the Board of Education to four members." 27a. The District Court was mindful that Alabama Law mandates that a county board of education be comprised of five members, Section 16-8-1, Code of Alabama (1975). 42a-43a, 46a. The District Court declined to "alter the composition of the Board created by the Legislature unless compelled to do so by overriding constitutional considerations." 42a.

The District Court further found that this Board of Education was

operating under a terminal desegregation order issued in the case of Lee v. Macon County, C.A. 604-E (M.D. Ala., June 12, 1970). Under such order the Board was and is required to operate the system under a four attendance zone concept which as the District Court found were and are "centered around the four cities of Pickens County." 45a. Further relating the school attendance zones to the Commissioners' districts, the District Court determined that to fashion a five single-member district scheme out of a four attendance zone - four correctly apportioned single-member district county would "create a situation where one of the five districts has neither no schools in it or parts of two or more such attendance zones." 45a.

Whether the circumstances of the case are indeed special enough to justify the at-large seat is inherently a question of fact. The District Court found it compelling enough that the Board needed five members to avoid the "distinct possibility of deadlock votes" but, that five single-member districts would create an imbalance in voter representation, since there are only four school attendance zones. 43a-45a.

The Court of Appeals commented on the District's findings on the second and third unique circumstances by holding:

> As the (district) court viewed the problem, it was faced with either eliminating a structurally necessary, as well as legislatively mandated, fifth Board member, thus providing for a completely

> single-member district scheme, or reapportioning the Board of Education election districts to allow for five districts, thus providing for a Board member representing a district devoid of a high school and not predominantly identified with a particular school attendance zone. 18a-19a.

The Court of Appeals thus agreed with the District Court that "reapportionment into five districts is impractical," 21a, that maintaining Pickens County's four zone school system is justified, and that therefore, the District Court's plan of four single-member districts, responsive to the four school zones, and one multi-member district, responsive to all county voters, is "quite proper." 20a.

Both of the lower courts have examined the facts and circumstances of this case and have repeatedly found the

same to warrant the at-large seat. Petitioner would now have this Court again review the facts to determine whether it too finds the evidence sufficient to justify the at-large scheme of the Pickens County Board of Education. Such it would seem is not the duty of this Court in reviewing a petition for writ of certiorari. It is inherently recognized that this Court does not grant certiorari to review judgments based solely on questions of fact, or to review the sufficiency of evidence. National Labor Relations Board v. Waterman S. S. Corp., 309 U.S. 206 (1940); United States v. Johnston, 268 U.S. 220 (1925); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938); Southern Power Co. v. North Carolina Public

Service Co., 263 U.S. 508 (1924). However, the request of the Petitioner here seemingly asks this Court to do just that.

B.

The District Court's Plan Does Not Violate Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

Petitioners' first thrust in its petition to this Court argues that "the District Court Erred in Ordering a Re-apportionment Plan for the School Board that included an At-Large Position." (emphasis added). See, Petition, p. 22. Indeed, Petitioner must assume the plan at bar is a "court-ordered" one in order to invoke the arguments that "single-member districts are to be preferred in court-ordered...reappor-

tionment plans." Then, in an "about-face", Petitioner impliedly argues that the plan is not "court-ordered" but simply a "policy preference of the local school board", and therefore subject to the preclearance requirements of the Voting Rights Act. See, Petition at p. 31. Petitioner then cites McDaniel v. Sanchez, 452 U.S. 130 (1981), in support of his implied contention that the plan at bar is a "legislative" plan rather than a "judicial" one. Respondent would now show the Court that McDaniel should be distinguished from the case at bar, and that the modified single-member district plan here, is in fact, a "judicial plan," as Petitioner first assumes.

This Court, in McDaniel, states that two things are perfectly clear:

> First, the Act requires preclearance of new legislative apportionment plans that are adopted without judicial direction or approval. Second, the Act's preclearance requirement does not apply to plans prepared and adopted by a federal court to remedy a constitutional violation.

The language is unambiguous, and the distinction is between legislative plans and judicial plans. Only legislative plans, are subject to the preclearance requirements of the Voting Rights Act. Is the plan under consideration here as formulated by the District Court and approved by the Court of Appeals a "legislative" plan or a "judicial" one?

In McDaniel, the District Court ordered county officials to prepare and submit a reapportionment plan for judicial approval. The county officials

then employed an independent expert to draft the plan, and when the same was in its final form it was submitted and the Court approved the plan and authorized the conduction of elections under it. The Court of Appeals had vacated the lower court's order, holding that a "proposed reapportionment plan submitted by a local legislative body does not lose its status as a legislative rather than court-ordered plan merely because it is the product of litigation conducted in a federal forum," 615 F. 2d 1023, and that therefore, the plan needed preclearance under the Voting Rights Act.

In McDaniel, the county officials and their agents, not the Court, actually formulated and devised the proposed plan, whereas the Court merely

approved it. Hence, the "proposal reflect(ed) the policy choices of the elected representatives of the people...," making the same a legislative plan, and preclearance was required, McDaniel v. Sanchez, supra, at p. 139.

In the present case, however, the Pickens County officials and the school board neither formulated nor devised the plan adopted by the District Court. The record unequivocally shows that the legislative plan of the Board had been objected to by the Attorney General, thus, the District Court "declined to approve" such a plan. 40a. The plan here clearly is a judicial one, and as such, is not subject to the preclearance requirements of the Voting Rights Act.

This Court should deny the request for the Writ of Certiorari requested by Petitioners and in doing so allow the consistent judgments and opinions of the District Court and Court of Appeals to stand.

CONCLUSION

For the aforegoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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[639 F.2d 1191]

JAMES H. CORDER, and Harry W. WESTERN on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants;

v.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County et al.,

Defendants-Appellees.

No. 76-3601

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

March 16, 1981

Appeal from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, HILL and FAY, Circuit Judges.

TJOFLAT, Circuit Judge:

This case is before us following the

district's court's compliance with our last remand order. Corder v. Kirksey, 625 F.2d 520 (5th Cir. 1980) (Corder II). We affirm the findings and conclusions of the district court.

Because an understanding of the procedural posture of this case is important for an adequate prespective on our opinion, we shall discuss briefly the history of this litigation. For a more complete exposition of the history of this case, reference should be had to our opinion in Corder v. Kirksey, 585 F.2d 708 (5th Cir. 1978) (Corder I).

I

In 1973 the black residents of Pickens County, Alabama brought this action to challenge the constitutionality of the procedures used to elect the Pickens County Commission, the Pickens County

Democratic Executive Committee[1], and the Pickens County Board of Education. This action was based upon allegations that the relevant election districts were impermissibly malapportioned, see generally Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and that the at-large components of the electoral schemes unconstitutionally diluted the votes of blacks. See White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

Before this action was commenced, the procedure for election of Picken's five county commissioners was as follows: each of four districts nominated Commission

---

1. None of the issues presented below concerning the Democratic Executive Committee remain for resolution on this appeal. See Corder v. Kirksey, 585 F.2d 708 at 710, n.3 (5th Cir. 1978) (Corder I).

candidates. These nominees then stood for election at large, all voters in the county voting for a candidate for each vacant Commission seat. This resulted in the election of four commissioners, each representing one district. The County Probate Judge filled the fifth Commission seat. Before this suit, the five members of the Board of Education were elected in the following manner: each of four members of the Board were required to reside in one of four districts, thus assuring each district's representation on the Board. Each of these candidates, however, was nominated on a county-wide basis. The fifth Board member was not required to reside in a particular district, and was also nominated at-large. All five members were elected on a county-wide or at-large basis.

On the plaintiffs' motion, the district court invalidated the district apportionment scheme employed in both the Commission and Board of Education elections as violative of the "one man, one vote" mandate of Reynolds, supra. The court enjoined the election of Commissioners until the Alabama Legislature corrected the constitutional defects in the scheme. Alabama promptly redrew the Commission district lines, but did not alter the at-large feature of the Commission election plan. The plan was submitted to the court and approved. On this appeal, the plaintiffs do not contest the validity of the new district lines. Rather, they argue that the at-large feature of the election of county commissioners is constitutionally offensive.

In regard to the Board of Education, the district court found the time

constraints imposed by an impending election to mandate a court-fashioned, rather than state-legislated, remedy. Accordingly, the court provided that the Board of Education would be elected according to the following plan: the Board would remain a five-member board. Four members were to be nominated and elected from four single-member districts corresponding to the constitutionally reapportioned Commission election districts. The fifth member, and Chairman, of the Board was to be elected at large. The plaintiffs readily accepted the district approtionment scheme and, also, the provision that four single-member districts would each elect a single representative. The plaintiffs contested, however, the at-large election of the fifth Board member.

When initially faced with this appeal, we remanded the case to the district

court for further findings in regard to both the court's approval of the at-large feature of the Commission election plan and the court's decision to fashion a Board of Education electoral scheme that included an at-large component. We instructed the district court to make findings on the former issue in light of our decision in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), and on the later [sic] issue in light of the requirement that "it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance [as opposed to a multimember district or at-large scheme] cannot be adopted." Chapman v. Meier,

420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). See also Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977); Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320 (1973); Connor v. Johnson, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971); Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977).

On remand, the district court made findings and concluded that neither the Commission nor the Board of Education at-large schemes were constitutionally offensive. Record, vol. 1 at 214. When the case was resubmitted to us, however, we found that an intervening Supreme Court decision, Mobile v. Bolden, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), had cast doubt on the vitality

of this circuit's approach, as articulated in Zimmer, supra, to the constitutional adequacy of legislatively enacted at-large schemes of election. Thus, we remanded the case again to the district court for further findings on the Commission election plan in light of the Supreme Court's mandate in Bolden. The district court has complied with our request, and has once again found the at-large plan constitutional. Record, vol. 1 at 225. The case is now in a posture that permits the resolution of plaintiffs' appeal.

II

A.

Plaintiffs first contend that the district court erred in approving the legislative decision to implement a scheme calling for the at-large election of county commissioners. The plaintiffs

argue that the at-large system of election dilutes the votes of blacks, and thus violates the fourteenth and fifteenth amendments of the Constitution.

It is clear that an at-large election is not a per se unconstitutional dilution of minority votes. White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858, 1868, 29 L.Ed.2d 363 (1971). Prior to Bolden, the law of this circuit required "a showing of racially motivated discrimination" for successful prosecution of a claim of constitutionally impermissible vote dilution under the fourteenth or fifteenth amendments. Nevett v. Sides, 571 F.2d 209, 219, 220 (5th Cir. 1978), cert. denied, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). See also Bolden, supra, 446 U.S. at 99, 100 S.Ct.

at 1517 (1980) (White, J., dissenting). That showing, however, could be made through recourse to inference; inference compelled by "such circumstantial and direct evidence of intent as may be available." Bolden v. Mobile, 571 F.2d 238, 246 (5th Cir. 1978) (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S.Ct. 555, 564, 50 L.Ed.2d 450 (1977)), reversed, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

A plurality of the Supreme Court has held that this circuit's previous standards for reaching an inferential determination of discriminatory intent are inadequate. Bolden, supra, 446 U.S. at 72, 100 S.Ct. at 1503 (per Stewart J.). Our failure, however, appears to have turned on the quantum of evidence required for such a finding, rather than

upon the substance of the approach itself:

> [T]he Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination, but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in Zimmer v. McKeithen .... That approach, however, is inconsistent with our decisions in Washington v. Davis ... and Arlington Heights.... Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose.

Id. (footnote omitted).

This statement, coupled with the plurality's apparent reaffirmation of White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), see id., 446 U.S. at 69, 100 S.Ct at 1051, indicates the plurality held that we must apply a more rigorous test when drawing the inference of racially discriminatory

purpose from facts, yet may, indeed must, continue to reach such a determination by recourse to facts inferentially referably to a discriminatory purpose, albeit facts perhaps almost conclusively referable to that offensive purpose. Moreover, after examining Justice White's dissent in Bolden, as well as Justice Blackmun's concurrence in the same case, we believe a clear majority of the Supreme Court would endorse the constitutional validity of recourse to a factually based inferential determination of the existence of racially discriminatory purpose. The problem, simply put, is: What is an adequate quantum of proof?

We admit to an initial perplexity in regard to this issue. Nevertheless, our review of the district court's findings allow us to put off to another day any attempt at a definitive interpretation of Bolden. In this case, the district

court has found on remand that there are simply no facts in the record probative of racially discriminatory intent on the part of those officially responsible for the Pickens County Board of Commissioners at-large election scheme. Record, vol. 1 at 227. Having reviewed the record, it is apparent that those findings are not clearly erroneous. Therefore, the district court's approval of the legislatively enacted at-large scheme for the election of Pickens County's Commissioners passes constitutional muster, and plaintiffs' first contention must fail.

B.

We may not so easily dispose of plaintiffs' second contention. Plaintiffs argue that it was constitutionally impermissible for the district court to have fashioned a remedy in regard to the

selection of the fifth member of the Board of Education which provided for at-large election. In Bolden, a clear majority of the Supreme Court has reaffirmed that "'[S]ingle-member districts [as opposed to at-large, or multi-member district schemes] are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. Mahan v. Howell, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed.2d 320.' Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465." Bolden, 446 U.S. at 66 n.12, 100 S.Ct. at 1499 n.12 (1980). See also Bolden at 103-106, 100 S.Ct. at 1520-21 (1980) (Marshall, J., dissenting).

This circuit has followed that mandate: "When district courts are forced

to fashion reapportionment plans, the general rule is that single-member districts are to be preferred." Wallace v. House, 538 F.2d 1138, 1142 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977). In interpreting this standard, we have maintained that the unique or special circumstances allowing for a court-fashioned election scheme incorporating an at-large element were circumstances encompassing "the rare, the exceptional, not the usual and diurnal." Id. at 1144. It is against this standard that the district court's scheme must be judged.

The district court offers essentially two reasons for imposition of the at-large plan to elect the fifth Board of Education member. The first is that the short time it possessed to fashion a fair remedy in the face of an impending

election dictated the use of the at-large plan as a matter of constitutionally appropriate expediency. Record, vol. 1 at 219. While this might surely justify imposition of an interim remedy, see Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977), see also Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), we refuse to hold that it is sufficiently weighty to justify a permanently established, court-fashioned at-large election plan.

The second 'unique circumstance' is that Alabama has a longstanding policy favoring five-member boards of education. This policy makes good sense given the majority-vote decisionmaking procedure of these boards and the particular Pickens County plan of four school attendance zones and corresponding four

high schools, (both schemes established in a successful effort to comply with a desegregation order, see Record, vol. 1 at 220). Since these zones "substantially overlap" the Commission and Board of Education election districts, it is appropriate that while one Board of Education member should be elected from and represent each of these zones, the necessary fifth member, "responsive to all voters," should be elected on a county-wide basis. Record, vol. 1 at 219-220. As the court viewed the problem, it was faced with either eliminating a structurally necessary, as well as legislatively mandated, fifth Board member, thus providing for a completely single-member district scheme, or reapportioning the Board of Education election districts to allow for five districts, thus providing for a Board

member representing a district devoid of a high school and not predominately identified with a particular school attendance zone.

We agree with the district court that a five-member board of education makes good sense in Pickens County. We also agree that the facts as found by the district court reveal circumstances special enough to allow the at-large scheme of election.

Pickens County's four-attendance-zone system was the result of a terminal desegregation order. Thus, those zones are certainly not properly referable to purposeful discrimination. Moreover, although the finding of "substantial overlap" between the constitutionally apportioned election districts and the school attendance zones is a bit rough, it is in our judgment, not clearly

erroneous. See Record, vol. 1 at 146. These findings, coupled with an understanding that school board members traditionally represent a constituency composed of those who send their children to particular schools, makes the district court's plan for one member to be elected from and represent each of four districts, each roughly approximating a school attendance zone, quite proper.

The matter of the fifth member, while problematic, seems most appropriately resolved as the district court has done. Given Alabama's expressed policy, and the structural desirability of a five-member board, it is proper that a five-member board be maintained. The appropriateness of this goal, when coupled with the unique circumstances justifying maintenance of Pickens County's four-zone school system, and its overlapping

constitutionally apportioned four election districts, leads to an acceptance of an at-large scheme. Since reapportioment into five districts is impractical, and because a five-member board is structurally preferable, a county-wide election of the fifth member seem the most appropriate result.[2]

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2. We have applied what we feel to be the proper test for determining the constitutional adequacy of a court-fashioned at-large scheme. It is necessary, however, for us to offer this brief aside concerning a problem potentially connected with qualitative vote dilution claims such as that of these plaintiffs.

When one person's vote is given more weight than another's, the judicially cognizable constitutional violation is clear. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Simply put, the disproportionate distribution of the right to vote is mathematically demonstrable--it is objectively verifiable. A claim of qualitative vote dilution, on the other hand, is quite distinct. The claim there is that, despite each man having an equal vote, as well as having equal access to the voting process, the majoritarian form of election somehow fails to "serve the

FOOTNOTE CONTINUED ON FOLLOWING PAGE

FOOTNOTE CONTINUED---values of fair representation." Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2921, 53 L.Ed.2d 1060 (1977).

> "[T]he focus in such cases [qualitative vote dilution cases] has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities ..., a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." Whitcomb v. Chavis, 403 U.S. 124, 158-159, 91 S.Ct. 1858, 1877, 29 L.Ed.2d 363. Bolden, supra 446 U.S. at 65, 100 S.Ct. at 1499 (1980).

In the proceedings below, the plaintiffs highlighted this aspect of their claim with particular clarity:

> The essence of all "one person-one vote" cases is to make such a system as representative as possible ... John Stuart Mill expressed it best when he wrote, in Representative Government:
>
> > In a really equal democracy any and every section would be represented, not disproportionately, but proportionately.

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FOOTNOTE CONTINUED ---

> A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority.

Plaintiffs' Memorandum In Support Of Motion For Relief, Record, vol. 1 at 177.

The Supreme Court has voiced similar sentiments in discussing the preference for single-member district democracy in court-fashioned elections. It is said that, in the absence of a "singular combination of unique factors," single-member districts are preferred because multimember districting and thus at-large schemes, see Bolden at 69-71, 100 S.Ct. at 1501-02 (1980), contribute to making "legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities...." Connor v. Finch, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465 (1977).

This stance troubles us a great deal. First, it seems at odds with the Bolden plurality's decided emphasis on verifiable discriminatory intent as the basis for a finding of constitutionally impermissible vote dilution. Second, and much more troubling,

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For the foregoing reasons, we must reject plaintiffs' contentions and affirm the judgment of the district court.

AFFIRMED.

FOOTNOTE CONTINUED---is the implicitly political character of this position. Perhaps it is the judiciary's role to work justice for those discrete, insular minorities at a perceived disadvantage in our system of representative democracy, see United States v. Carolene Products Co., 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 783 n.4, 82 L.Ed. 1234 (1938), but we question whether that role is most effectively served by immersing the court in the resolution of questions which center upon the legitimacy of conflicting theories concerning the nature of a truly representative form of government.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF

ALABAMA, WESTERN DIVISION

JAMES H. CORDER, et al.,
Plaintiffs;

v.

ROBERT H. KIRKSEY, et al.,
Defendants.

CIVIL ACTION NO. 73-M-1086

[Filed March 17, 1976]

ORDER

Pursuant to the Court's order of January 23, 1975, defendant Pickens County Board of Education has filed its response and report to the Court seeking approval of the plan of apportionment for the Board of Education as set forth in Act No. 72, Senate Bill No. 9, passed by the 1975 Fourth Special Session of the Alabama Legislature and approved by

the Governor of Alabama on November 14, 1975. This cause is before the Court also on plaintiff's motion for injunctive relief.

The Court has been informed that the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 has objected to the plan of apportionment as set forth in Act No. 72. The Court is of the opinion that this plan cannot be enforced and declines to approve the plan. The Court is further of the opinion that under the circumstances, particularly the impending primary election to be held on May 4, 1976, for which candidates must qualify by March 19, 1976, the Court must fashion a plan of apportionment for the Pickens County Board of Education.

Although there is a preference for single-member districts when a court is called upon to fashion a plan of appor-

tionment, this Court finds that there are unusual circumstances which justify adoption of a modified single-member district plan. First, the short period of time remaining before the primary election is not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. Secondly, although the four Commissioners' Districts of Pickens County are constitutionally apportioned, the Court declines to order the reduction of the Board of Education to four members. Thirdly, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and while the zones are not congruent with the Commissioners' Districts, there is a substantial overlap.

Having considered the response and report of the Board of Education, the

motion, the pleadings and other papers on file in this case, the briefs and argument of counsel, the applicable law and the evidence presented in open court, the Court is of the opinion that one member of the Pickens County Board of Education should reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member should be nominated and elected at-large without regard to the place of residence within Pickens County.

Accordingly, it is ORDERED, ADJUDGED and DECREED that henceforth one member of the Pickens County Board of Education shall reside in and be nominated and elected from each of the Pickens County Commissioners' Districts and one member shall be nominated and elected at-large without regard to be place of residence within Pickens County, according to the

following schedule:

Member at large	1980
District 1	1976
District 2	1978
District 3	1980
District 4	1976

It is ORDERED further that in all other respects the request for relief as to the Board of Education made by plaintiffs in their motion for injunctive relief is hereby denied.

Done this 17th day of March, 1976.

S/FRANK H. McFADDEN
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

JAMES H. CORDER and HARRY W. WESTERN, on behalf of themselves and all others similar situated,

Plaintiffs,

v.

ROBERT H. KIRKSEY, Ind. and as Probate Judge of Pickens County, et al.,

Defendants.

C.A. 73-M-1086

[Filed February 16, 1979]

MEMORANDUM OPINION

By order dated November 16, 1978, the Court of Appeals remanded this matter for further findings. This memorandum opinion is issued in lieu of findings pursuant to Rule 52 Fed. R. Civ. P.

This case challenged the apportionment scheme of the Pickens County, Alabama County Commission, Board of Education and Democratic Executive Committee. The thrust of the complaint was directed toward the disparity in population of the election districts and a contention that election in multi-member districts diluted the voting strength of blacks.

The court, by order dated January 23, 1975, held unconstitutional the then existing legislative act, Act 141, 1967 Regular Session, setting up the election districts for the Pickens County Commission because it violated the doctrine of one-man, one-vote. The court also invalidated the election scheme for the Board of Education and that of the County Democratic Executive Committee. It directed the Democratic Executive Committee to reapportion itself and held the case in abeyance in order to give the

legislative process an opportunity to correct outstanding apportionment problems in Pickens County with respect to the County Commission and the Board of Education without further judicial intervention. The court was of the opinion that it should give the Legislature an opportunity to correct the imbalance with respect to the two legislatively created boards.

> [R]eapportionment is primarily a matter for legislative consideration and determination, and . . . judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

Reynolds v. Sims, 377 U.S. 533, 586, 84 S.Ct. 1362, 1394 (1964). See also Burns v. Richardson, 384 U.S. 73, 83, 86 S.Ct. 1286, 1292 (1966).

COUNTY COMMISSION

By order dated March 12, 1976,

the court approved the plan of apportionment of the Commissioner's districts of Pickens County as set forth in Act No. 594, H.B. 1566, passed by the 1975 Regular Session of the Alabama Legislature and approved by the Governor of Alabama on October 1, 1975. This plan provided for four Commissioner districts of substantially equal population. Candidates are nominated from each district but are elected in the general election on an at-large basis. The fifth member of the commission is the probate judge.

Plaintiffs' present objection to the Commissioners' plan is to the at-large general election, which they claim dilutes the voting strength of the blacks.

At-large election procedures are not per se unconstitutional. Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858,

1868 (1971); Nevett v. Sides, 571 F.2d 208, 222 (5th Cir. 1978); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

In order to carry their burden of showing a dilution of voting strength, plaintiffs must show either a racially motivated plan, or that the apportionment scheme would operate to minimize or cancel out the voting strength of the black voters. Zimmer v. McKeithen, supra.

According to 1970 Census figures, Pickens County had a population of 20,326. There were 11,854 whites (58%) and 8,466 (42%) blacks. The over eighteen group was 65% white and 35% black. According to 1974 registration figures, there were 11,699 registered voters in the county, 30% black and 70% white. There is no evidence before the court with respect to a population breakdown; that is, there is no evidence about the

distribution of the black population from which an inference could be drawn with respect to the voting strength.

Applying the test of Zimmer v. McKeithen, supra, the court is of the opinion the plaintiffs have totally failed to carry the necessary burden of proof with respect to the county commission. The court is mindful of the admonition of the Court of Appeals on remand, but there is no evidence before the court on which to draw inferences that the election scheme dilutes the voting strength of blacks or that the scheme was designed to discriminate against blacks.

There are no black elected County Commissioners in Pickens County. However, as the court noted in Zimmer, a disparity between the number of minority residents and the number of minority representatives is insufficient in and of itself

to establish unconstitutionality of the statute.

The general law of Alabama provides for the at-large elections in county commission elections, but this has been modified in many instances by local acts. There is no evidence that this policy is in any way connected with racial discrimination; plaintiffs simply put no evidence on with respect to this issue.

There was no evidence of racial polarization in Pickens County. There was evidence of voter crossover, whites voting for blacks and blacks voting for whites. Plaintiff Corder testified that there were no problems in registering blacks to vote and that the Board of Registrars fully cooperated in registering blacks. There was further evidence that there was no trouble of a black getting on a ballot to run for

public office. In short, there was no proof of any denial of political access in that county to the blacks; nor was there any eivdence of discrimination in the distribution of services to blacks. There was evidence of money spent on a countywide water system provide service to all black communities, a new social service center, a new county hospital, in cooperative efforts with the Black Economic Development Council. There was evidence of black participation in all aspects of the political and community life of the county.

The only evidence plaintiffs submitted on this issue was to the effect that some rural black churches did not get paved parking lots promised for political support and there were not enough blacks in managerial positions in the county.

It does not appear to the court that the at-large general election feature contravened the Constitution and accordingly the court was loath to substitute its judgment for that of the Legislature, notwithstanding the Supreme Court's clearly stated preference for single-member districts when federal courts have to fashion a remedy. Had the court been fashioning a remedy, as in the case of the school board, I might well have opted for single-member districts as I did there; but, absent proof of impermissible discrimination in the scheme, the court did not deem it appropriate to substitute its judgment for that of the Legislature.

This court should not strike down laws merely because it believes them to be unwise. Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030 (1963).

"[C]ourts do not substitute their social and economic [and political] beliefs for the judgment of legislative bodies, who are elected to pass laws." Id. at 730, 83 S.Ct. at 1031. This Court should invalidate laws only when they are constitutionally impermissible.

In this connection, it should be noted that while the evidence is somewhat sketchy, it appears that generally speaking the elections are determined in the nominating primaries. According to the evidence, only one Republican had been elected to a county office in Pickens County. No candidate from the National Democratic Party of Alabama, the once predominantly black political party, has been elected. Nomination by the Democratic Party is generally tantamont to election. As plaintiffs stated in a memorandum submitted to the court on August 30, 1974 in

support of a motion for partial summary judgment: "Since Pickens County, like most rural counties in Alabama, has one predominant party, the results of the Democratic Primary are usually conclusive."

BOARD OF EDUCATION

The court declined to approve a reapportionment plan passed by the Alabama Legislature for the Board of Education because the Attorney General of the United States, pursuant to Section 5 of the Voting Rights Act of 1965, had objected to the plan of apportionment. The court accordingly fashioned a reapportionment plan based on the four Commissioner's districts. The court's order required the election of one member from each district, and the fifth was to be nominated and elected by the county at-large. The plaintiffs sought

sought five single-member districts. The Court of Appeals strongly suggests that the court should have used the Commissioner districts and caused the election of a four-man Board of Education.

Although there is a preference for single-member districts, when a district court is called upon to fashion a plan of apportionment, this court found and finds again that there are special and unusual circumstances which justified the adoption of a modified single-member district plan. First, the short period of time remaining before the Primary Election was not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. The deadline for qualifications was March 19, 1976. The election was to be held on May 4, 1976. The probate judge, who is responsible for the orderly

operation of the election process, testified that at least 10 to 12 different ballots would be required for the upcoming Democratic Primary as well as for the Republican Primary to be handled concurrently. To create five districts in addition to the four Commissioner districts would result in even further complicating the already difficult process.

Second, although there are four Commissioner districts which are constitutionally apportioned the court declined to order the reduction of the Board of Education to four members. Neither party suggested this alternative and the court was and is of the opinion that it should not alter the composition of the Board created by the Legislature unless compelled to do so by overriding constitutional considerations. Under Alabama

law, Title 52 §63, Code of Alabama (now §16-8-1, Code of 1975), a county board of education is to be composed of five members. While there is the suggestion of authority to make such alterations in a legislatively created body, this court is reluctant to do so absent compelling constitutional reasons. See Bolden v. City of Mobile, 571 F.2d 238, 246-247 (5th Cir. 1978), probable jurisdiction noted 47 U.S.L.W. 3221 (Oct. 3, 1978). Moreover, the exercise of such authority if it exists seems inapporpriate in this case. In the court's opinion, the fifth member would be an indispensable person in the Board's operation of the system. Most, if not all, decision-making bodies composed of more than one individual have an odd-number of members. Even-numbered decision-making bodies create a distinct possibility of deadlock votes.

The fifth position of the Pickens County Board of Education elected at-large is the chairman. The testimony from both sides is clear that Board members elected from a district tend to be more responsive and concerned, as they should be, with their respective school patrons. The chairman not only prevents deadlocks, but because elected at-large represents the entire county and has to be responsive to all the voters. The balancing effect of the fifth member thus is obvious to this court.

Third, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones, and, while the zones are not congruent with the Commissioner's districts, there is a substantial overlap. These four attendance zones are the result of a terminal

desegregation order issued in the case of Lee v. Macon County, C.A. 604-E (M.D. Ala., June 12, 1970). These zones are centered around the four cities of Pickens County (Aliceville, Carrollton, Gordo and Reform). The only four high schools and related feeder schools are located in these same cities and zones. The election scheme of Board members has followed the high school attendance zones since at least 1949. A fifth single-member district would create a situation where one of the five districts has either no schools in it or parts of two or more such attendance zones. The imbalance of such a scheme is inherent.

S/FRANK H. McFADDEN
Chief Judge

February 16, 1979

§16-8-1. Code of Alabama (1975)

Composition; election; qualifications.

The county board of education shall be composed of five members, who shall be elected by the qualified electors of the county. They shall be persons of good moral character, with at least a fair elementary education, of good standing in their respective communities and known for their honesty, business ability, public spirit and interest in the good of public education. No member of the county board of education shall be an employee of said board; provided, that in counties having populations of not less than 96,000 nor more than 106,000 according to the most recent federal decennial census, not more than one classroom teacher

employed by the board may serve as a board member and also as a teacher. Members shall not be required to hold teachers' certificates. (School Code 1927, §§87, 92; Code 1940, T. 52, §§ 63, 68; Acts 1949, No. 369, p. 542; Acts 1949, No. 667, p. 1031; Acts 1964, 1st Ex. Sess., No. 249, p. 346; Acts 1969, No. 331, p. 705.)